Supreme Court, U.S.
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In the

Supreme Court of the United States

Bonnie L. Geissal, as personal representative of the Estate of James W. Geissal,

Petitioner,

v.

Moore Medical Corporation; Group Benefit Plan, of Moore Medical Corp.; Hebert Walker

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When an ERISA plan administrator's COBRA violation forces innocent health care providers and secondary carriers to pay for a participant's health care benefits, is the plan participant entitled to recover such benefits as legal restitution and hold it in constructive trust for the benefit of these third parties?

II. Can an ERISA health care plan administrator take advantage of later payments made by another COB insurer to avoid paying benefits, where the other insurer would not have paid but for the administrator's COBRA violation and the express terms of the primary insurer's plan prohibits taking credits for such other COB insurer's payments?

III. Should a lower court refuse to entertain ERISA 502(c) penalties against a clear "disparagement" of the plain meaning of the COBRA statute and attempt to create "draconian alternatives" to Congressional intent, on the basis that the plan administrator's refusal to comply with the COBRA statute is "reasonably justifiable."

PARTIES TO THE PROCEEDINGS

Petition here, and plaintiff and appellant in the courts below, is Bonnie L. Geissal, personal representative of the Estate of James W. Geissal, deceased.

Respondents herein and defendants and appellees in the courts below, and are

Moore Medical Corp.
Group Benefit Plan of Moore Medical Corp., and
Herbert Walker

The Respondents were also cross appellants in the Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eight Circuit rendered July 31, 2003, is reported at 338 F.3d 926, and is reprinted in the appendix hereto as 1a through 17a. A petition for rehearing or rehearing *en banc* was denied September 12, 2003, and is not officially reported; it is printed in the appendix as 72a. A later grant of fees and costs to Plaintiff by the Eighth Circuit on Plaintiff's appeal and for Plaintiff's success in opposing Defendants' cross-appeal on fees is also unreported and appears in the appendix as 73a.

Of the two opinions of the United States District Court for the Eastern District of Missouri from which Plaintiff appealed, the first is reported at 158 F.Supp.2d 976, and is reprinted in the appendix as 18a to 53a. The second decision of the District Court, issued one year later, is unreported, and appears in the appendix as 54a to 71a.

JURISDICTION

This case was earlier before this Court. Geissal v. Moore Medical Corp., 524 U.S. 74 (1998).

The district court had jurisdiction of this action pursuant to 28 U.S.C. §1331 and 29 U.S.C. §§1132(a) and 1161. Upon remand by this Court, the magistrate judge continuing to act under the original consent given pursuant to 28 U.S.C. §636(c)(1) denied any remedy for Petitioner save for attorneys fees and costs, and issued final judgment on March 29, 2002.

Petitioner appealed to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. The judgment of the Court of Appeals was entered July 31, 2003. Petitioner filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition September 12, 2003.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

RELEVANT PROVISIONS

ERISA

ERISA §502, 29 U.S.C. §1132, in pertinent part provides:

> Sec. 1132 - Civil enforcement
>
> (a) Persons empowered to bring a civil action
>
> A civil action may be brought -
>
> (1) by a participant or beneficiary
>
> (A) for the relief provided for in subsection ©) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the

terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

©) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 [2] of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting

participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

COBRA NOTICE

The Consolidated Omnibus Budget Reconciliation Act ("COBRA") 29 U.S.C. provides

Sec. 1166. - Notice requirements

(a) In general – In accordance with regulations prescribed by the Secretary -

(4) the administrator shall notify -

(A) in the case of a qualifying event described in paragraph (1), (2), (4), or (6) of section 1163 of this title, any qualified beneficiary with respect to such event, and

(B) in the case of a qualifying event described in paragraph (3) or (5) of section 1163 of this title where the covered employee notifies the administrator under paragraph (3), any qualified beneficiary with respect to such event, of such beneficiary's rights under this subsection.

§1161. Plans must provide continuation coverage to certain individuals

(a) In general – The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

§1162. Continuation coverage

For purposes of section 1161 of this title the term "continuation coverage" means coverage under the plan which meets the following requirements:

(2) Period of coverage – The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

(A) Maximum required period. –

* * *

In the case of a qualified beneficiary who is determined, under title II or XVI of the Social Security Act (42 U.S.C. 401 et seq., 1381 et seq.), . . . to have been disabled at

> the time of the qualifying event,[1] any reference in clause (I) or (ii) to 18 months is deemed a reference to 29 months (with respect to all qualified beneficiaries), but only if the qualified beneficiary has provided notice of such determination under section 1166(3) of this title before the end of such 18 months.

STATEMENT

When the deceased plan participant James Geissal was terminated from employment status while suffering from cancer, defendants gave him what purported to be a COBRA notice which concealed the possibility or conditions for an eleven month extension. 29 U.S.C. § 1162(2)(A). Geissal elected COBRA coverage and paid premiums. Respondents did not treat their written notice or Geissal's election or premium payments as having meaning. Respondents secretly held up the medical bills they received for Geissal's care during this time, aggregating to $104,4587.34, and did not pay them.

After six months Respondents advised Geissal that they were rescinding and revoking the COBRA notice, dishonoring his election and their notice obligations *ab initio*. Respondents told all the medical services providers whose bills they had held up, that Respondents were never responsible for payment. The providers were told that they could only look to the TWA plan for payment. Aetna was the TWA plan's claims

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[1] Congress later amended this provision to cover those determined disabled within 60 days of the qualifying event.

administrator. Respondents were aware that there were already decided appellate cases holding that the terminating employer had the obligation to provide health coverage under COBRA. Lutheran Hospital of Indiana, Inc. v. Saint Joseph Medical Center, 51 F.3d 1308 (7th Cir. 1995); Oakley v. City of Longmont, 890 F.2d 1128 (10th Cir. 1989); King v. John Hancock Mutual Life Ins. Co., 500 N.W.2d 619 (S.D. 1993). This Court said the question was never even close, and charged the Eighth Circuit with engaging in social legislation to ameliorate the effects that Respondents' counterviews would cause. Geissal v. Moore Medical Corp., 524 U.S. 74 (1998) ("Geissal I").

After ruling by this Court in Geissal I, and remand, the magistrate judge initially viewed his obligation to address this Court's footnote 3, 524 U.S. at 78.[2/]

The parties presented to the district court an elaborate spreadsheet on what part of what bills TWA plan/Aetna had paid after Respondents' rescission of their COBRA notice. The spreadsheet also listed what parts of what bills had been charged to the Geissal's account or paid by Petitioner, and what part Aetna had forced the

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2/ This Court said in part

nothing in the record indicates one way or another whether Aetna has fully reimbursed Geissal for James Geissal's medical bills. Geissal's counsel represented at oral argument that at a minimum there are unpaid medical bills incurred on a trip to the Greek Islands. Quite apart from this, we cannot tell from the record whether Geissal may be entitled to recover from Moore even if sometime later Aetna would have a claim against Geissal to recover the insurance costs that it paid.

providers to discount though they had no discounting agreement with Respondents.

Based on the spreadsheet's showing of what Respondents gained by avoiding their COBRA obligations, Petitioner urged the doctrine of negative restitution entitled her to recover from Moore all the benefits it should have paid. However, Petitioner proposed in both in the district court and on appeal to hold all such monies that Moore wrongfully avoided paying, be held by her in constructive trust for TWA plan and for the discounting providers.

This constructive trust suggestion was long before the case ever came to the second appeal. In the district court Respondents acknowledged "Plaintiff, creatively, has requested a constructive trust in favor of TWA/Aetna." On page 2 of her opening brief in the current appeal to the Eighth Circuit, Petitioner noted that constructive trust was a subject urged by plaintiff below, saying

> Moore's counsel at one time assured the [Supreme] Court his only concern was that Moore "don't intend to pay twice." Plaintiffs always recognized they would have to deal with Aetna, the secondary insurer acting for the TWA plan, once benefits were paid. That recognition was exactly why they urged McGee on the district court, albeit more in terms of ***constructive trust*** and common fund. [citations omitted; emphasis supplied]

The Eighth Circuit nonetheless determined Petitioner had never raised the issue of constructive trust until her reply brief on appeal.

Upon remand from this Court, Petitioner offered the TWA plan contained a subrogation clause, confirming Petitioner's always stated position that "sometime later Aetna would have a claim against Geissal to recover the insurance costs that it paid" *if* Petitioner had obtained any monetary relief whatsoever. Contrary to the Eighth Circuit, 338 F.3d at 930, Petitioner always acknowledged plaintiff's obligation under the TWA subrogation clause, and in oral argument earlier told this Court that she will have to deal with TWA plan if she recovers the relief she seeks.

In that part of the Moore plan having to do with the Moore plan's coordination of benefits, one term prohibited crediting the Moore plan for payment of any benefits unless the Moore plan had paid the other "coordinating" plan. Moore paid nothing to the TWA plan.

The question posed by this Court in its footnote 3 in Geissal I and quoted in footnote 2 above, was never answered by the district court. The magistrate judge concluded that when a participant seeking an unpaid benefit dies at any time before the conclusion of litigation, all rights to plan benefits under ERISA §1132(a)(1) cease. He then appeared to accept the doctrine that "restitution seeks to punish the wrongdoer by taking his ill-gotten gains," Geissal v. Moore Medical Corp., 158 F.Supp.2d 976, 981 (E.D. Mo. 2001), but he concluded this doctrine would somehow be giving plaintiff what he called "compensatory damages." *Id.* at 983. He did not address Petitioner's suggestion that the monies be

held as a constructive trust for the many third parties who had been injured, but instead joined the chorus of lamenters of the inadequacy of proper ERISA remedies. *Id.* at 983-84, as if ERISA tied his hands in awarding restitution or creating a voluntary constructive trust.

Without reference to this Court's finding in Geissal I of "no justification for [Respondents] disparaging" statutory clarity, 524 U.S. at 87, and the "draconian alternative" defendants would lead the nation to accept, *id.* at 85, the magistrate judge and the Eighth Circuit found Respondents had provided an initial COBRA notice and they would go no further. Both lower courts ignored the uncontested evidence that Respondents made no attempt to comply with the notice save for collecting premiums from Mr. Geissal, that Respondents held up over a hundred thousand dollars of medical billings while premiums were being paid, and then later Respondents "revoked" such notice retroactive to the giving of the notice. Both lower courts found Respondent's conduct to have been "based on a reasonable interpretation," words foreign to Geissal I. Both lower courts freed Respondents of all ERISA imposed penalties for a written notice Respondents voided *ab initio*.

REASONS FOR GRANTING THE WRIT

Upon remand in Geissal v. Moore Medical Corp., 524 U.S. 74 (1998), on the issue of ERISA remedies the Eighth Circuit rejected the ERISA doctrine of restitution made clear by this Court in Great-West Life Assurance Corp. V. Knudson, 524 U.S. 204 (2002), citing Reich v. Continental Casualty Co., 33 F.3d 754 (7th Cir. 1994), assuring that the wrongdoer avoided any loss from

its COBRA obligations and shifted that loss to third parties, whom Petitioner asked to protect by having her hold such amounts of promised but unpaid benefits in constructive trust for those who did eventually pay for the health care Petitioner's decedent required and which Respondents refused to pay. The Eight Circuit instead would again engage in its own form of social legislation by its judicial amendment of ERISA to allow the a dual coverage secondary plan that suffered loss due to Respondents' defalcation, to sue the Respondents as wrongdoer directly for a monetary recovery for sums the secondary plan paid in violation of ERISA's limitation on proper parties to an ERISA suit in 29 U.S.C. §1132(a) and in violation of this Court's decisions in Knudson, *supra*, and in Mertens v. Hewitt & Associates, 508 U.S. 248 (1993) limiting parties and prohibiting monetary remedies to all but the participant. The issue of the status of the secondary payer to seek relief under ERISA does come up, as exampled by past cases such as Winstead v. J.C. Penney Co., 933 F.2d 576, 579-80 (7th Cir. 1991). This is an important issue of ERISA remedies in dual coverage situations that are not unique. Answer is needed.

The Eighth Circuit in determining ERISA penalties, seemed determined to ignore this Court's prior finding that the Respondents disparaged the plain meaning of the law to avoid their COBRA obligations, and the Eighth Circuit wrongly puts form over substance, finding that an illusory COBRA notice never intended to be followed or have effect, and then revoked *ab initio* is statutory notice and meets statutory notice and right of election requirements. Adherence to this Court's prior opinion and statutory demands deserves further review by this Court. Most courts impose penalties of some kind even if the plan administrator is in good faith to assure

deterrence.

ARGUMENT

QUESTION 1. This case presents ERISA remedy issues. The Eighth Circuit rejects the doctrine of negative restitution, and legislatively creates new causes of action for new parties in addition to those allowed in 29 U.S.C. §1132(a). To deny restitution the circuit creates monetary remedies for third parties that do not exist under ERISA except for participants. In prior oral argument before this very Court, Geissal I, Respondents' counsel said it only wanted to assure it only pays "once." Now the Eighth Circuit holds Respondents be entitled to keep the monies they wrongfully avoided paying. Respondents need not pay promised benefits even "once," they are to benefit by their wrongdoing under ERISA.

Although in oral argument in Geissal I Justice Bryer and Respondents' counsel engaged in a colloquy which concluded that no double recovery was possible, Respondents renewed the argument upon remand by this Court. Geissal I. The Eighth Circuit chose to use the term "windfall double recovery," 338 F.3d at 930, putting the onus on the victim rather than the wrongdoer, as if negative restitution were an abhorrent concept and it would serve ERISA purposes better if wrongdoers are enriched, rather than give the promised benefits to plaintiff who in turn is subjected to a subrogation clause to pay third parties and who is herself willing to be subjected to a constructive trust.

Although the Eighth Circuit criticized the time consuming exposition of remedies by Petitioner's counsel while remedies were pursued in the district court, 388

F.3d at 935-36, as if this Court's note 3 in Geissal I were to be ignored, Petitioner had envisioned, explained and proposed the viability of a constructive trust even *before* this Court's decision in Great-West Life Assurance Corp. V. Knudson, 524 U.S. 204 (2002), made a holding in constructive trust relevant. This Court said without a *res* to impose a constructive trust, a plan as subrogee cannot obtain monies the participant collects from third parties. There must be a constructive trust. See, *e.g.*, Administrative Committee of the Wal-Mart Stores, Inc. V. Varco, 2003 U.S. App. LEXIS 17772 (7th Cir. unpublished 2003) (constructive trust established in participant to service subrogation claim of plan that paid the health providers).

This case presents the Court with the opportunity to address the issue of adequate ERISA remedies in dual coverage or, more corrrectly, in coordination of benefits cases in which two plans have no contractual or statutory connection and neither has made any direct promise to the other.

Unlike other remedies cases, this case also raises in the dual coverage context the question of negative restitution, what to do about misconduct to wrongly shift the primary preempted benefits burden to another to avoid losses that the Eighth Circuit puts beyond remedy. 338 F.3d at 932. Judge Posner in his decision in Reich v. Continental Casualty Co., 33 F.3d 754 (7th Cir. 1994), clearly and succinctly sets out the concept of negative restitution as a valid ERISA and remedies concept. In Great-West Life Assurance Corp. v. Knudson, 524 U.S. 204 (2002) the Court cited Judge Posner's decision as the one setting out the correct view of restitution, whether legal or equitable, the latter calling for a *res*. Yet the

Eight Circuit says ERISA intended no remedy, no restitution, legal or equitable, for the wrongdoer's avoidance of paying benefits it had promised and was supposed to have paid. 338 F.3d at 932. Either Judge Loken or Judge Posner err. They both can't be right.

It is submitted the Eighth Circuit misreads this Court's Great West decision when it cites Great West to reject Reich. In a time when there is a clamor for better remedy, the Eighth Circuit chooses to limit remedies further.

The Eighth Circuit does not deny the secondary plan (TWA plan) and its member participants have lost monies they spent for Mr. Geissal's care that was the Moore plan's primary obligation to pay. While it suggests a decision favoring Petitioner would hurt the Moore plan, in the instant case the Moore plan is wholly unfunded. There is no trusteed monies at Moore in contrast to the TWA plan, a Taft-Hartley plan wherein funding exists. The Eighth Circuit is not protecting any participants in the Moore plan, but solely Moore's general revenues. Moore has no welfare fund to which trust concepts might apply. The Eighth Circuit decision cannot create the Moore plan into some deserving institution to which the doctrine of negative restitution of Reich would create a harm to innocents. Courts often believe that some "fund" exists when except for the largest employers there is none, as is the case here with the Moore plan.

Recognizing it may stand accused of rewarding the wrongdoer, the Eighth Circuit searched to find a way to eliminating the dilemma. To do this the Eight Circuit all but nullifies the decisions of this Court, such as Mertens v. Hewitt& Associates, 508 U.S. 248 (1993) and Knudson,

supra, which clearly limits litigants for breach under ERISA and prohibits monetary recoveries except to participants under §1132(a)(1). Even the terribly dated decision the Eighth Circuit relies upon to allow the TWA plan the right to sue the Moore plan, Winstead v. J.C. Penney Co., 933 F.2d 576, 579-80 (7th Cir. 1991), that circuit recognized how tenuous it was at the time to allow such a suit. How after Mertens and Knudson does the TWA plan or other coordinating (secondary) coverage plan sue under ERISA for monetary repayment of benefits that the primary coverage plan, Moore, owed only to its own participant Geissal? TWA plan is no party to the Moore plan. No promises were made by Respondents to TWA plan or its administrator. Is not the Eighth Circuit once again engaged in legislation to effect a "cure" for others, similar to its "substantial gap" legislation condemned in Geissal I?

The Eighth Circuit never explain how after Mertens and Knudson the TWA plan is to ever get a monetary judgment against Moore for benefits not paid to or for Geissal? TWA plan supplies no medical services to be a provider assignee, as was the case in Lutheran Med. Ctr. v. Contractors Health & Welfare Plan, 25 F.3d 616, 619 (8th Cir. 1994), upon which the Eighth Circuit relies. 338 F.3d at 933. No patient assignments were ever even in evidence in the instant case. Does this "carefully reticulated" ERISA statute say a subrogee stands in the shoes of a participant. Knudson suggests the two are different. *Cf.*, Community Health Plan of Ohio v. Musser, 347 F.3d 619 (6th Cir. 2003) (the courts are without jurisdiction under ERISA to hear the claims of enforcement of the subrogation clauses).

There are no state laws in this case enabling such suits between non-contracting insurers even if they both have (different or the same) coordination of benefits clauses. Even if there were state laws, does not ERISA preempt such laws. Cf. Arana v. Ochsner Health Plan, 338 F.3d 433 (5th Cir. 2003) (complete preemption for subrogation claims).

These questions beg for answer, for plans with the primary obligations under COBRA and "funded" solely by the employer paying for services out of general corporate revenues as billed, are encouraged by the Eighth Circuit to reject their COBRA obligations, assured that time can only work only a benefit to them. This case is example how a skillful defense can stall a case for years until the lower court can even justify no remedy sufficient to allow repaying the vulnerable secondary plan. Geissal is no latecomer to raising his rights, as the district court acknowledges. The issue of dual coverage and who bears the responsibility for paying, and how collection of those obligations to the secondary are to be enforced, are greater than ever. Should the Eighth Circuit once again be heard to suggest it need not wait for legislation before allowing the TWA plan to sue another plan for a monetary remedy under ERISA which ERISA does not allow, Mertens, in preference to allowing Petitioner to obtain and hold such benefits in a constructive trust for TWA plan and providers she has long ago offered to assume.

QUESTION 2. The second question presented for review more directly raises the question about plans in dual coverage cases, such as this, and the Eight Circuit's unwillingness to give any credence to the plan terms that affect what happens when there are plans that have

coordination of benefit provisions. When there are coordinating plans and the Moore plan is primary, as would be the case here,[3] the Moore plan expressly prohibits Respondents from taking credit for any payments made by a secondary plan unless Moore had made payment to the secondary plan.[4] The Eighth Circuit reads this clause out of the plan, to find an earlier appearing generic plan provision that provides "benefits are not payable for . . . services for which there is no obligation to pay," somehow applicable because of Respondents' own default and disparagement of its COBRA obligations.

There was an obligation on the Geissals to pay at the time the bills when rendered, and the fact that TWA plan had to come in to later make good because Respondents refused, does not remove the fact that an obligation had been incurred that became Moore's obligation. Even the Eighth Circuit had once agreed with that. See Fosso v. State Farm Mut. Aut. Ins. Co., 940 F.2d 388 (8th Cir. 1991) (at the time of receiving the bill the plaintiff was entitled to the insurance benefit, and insurer cannot take advantage of the other insurer's

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[3]Because of the magistrate judge's view that death forecloses benefits, he never had to determine whether any terms of the plan as to benefits had been breached, whether the coordination provisions applied, and whether one looks only in hindsight almost ten years after suit was brought, to see if medical bills were still owed. Though it found the magistrate to have erred on the issue of death, the Eighth Circuit chose not to remand, but to act as the trial court on these construction issues.

[4]IV2(4) of the Moore plan provides its "benefits are determined before those of the other program, and without considering the other Program's benefits."

payments unless the other insurer is first liable). The concept of not crediting the wrongdoer for later payments of another insurer, even if not a coordinating one, is not unusual outside ERISA. See Samsel v. Allstate Ins. Co., 59 P.3d 281 (Az *en banc* 2002) reviewing cases. Missouri follows the majority. Farmer v. Personnel Pool of Platt County, 110 S.W.3d 818 (Mo. 2003). There is nothing in the legislative history to suggest Congress intended by ERISA to change state law interpretation of essentially health insurance policies. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-113 (1989).

When to this we add the doctrine of negative restitution, that a wrongdoer must be required to pay the loss it improperly avoided by its disparagement of the law and its own contract promises when there are coordinating group plans, Reich, *supra*, the Eighth Circuit opinion raises such a significant departure from established law that a writ is deserving to determine ERISA remedies.

QUESTION 3. On the third question dealing with penalties, the Eighth Circuit practically discounts this Court's prior unanimous reversal. In most cases in which there has been a failure of compliance with COBRA the courts have had no difficulty in imposing some penalty, even if they found defendant's conduct had some reasonable bases on either fact or law. See, e.g. Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993) (even if plaintiff suffered no prejudice, ERISA penalty provisions were designed not to rectify prejudice to a participant but "to punish noncompliance" with ERISA's statutory requirements: "the mere absence of bad faith no more exonerates the [statutory] failure . . . than does the absence of prejudice to the plan participant.") *Accord*,

Moothart v. Bell, 21 F.3d 1499 (10th Cir. 1994) (upholding $30/day penalty); Boone v. Leavenworth Anesthesia, Inc., 20 F.3d 1108 (10th Cir. 1994) ($50/day penalty): Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1233 (11th Cir. 2002) (even if plaintiff suffered no prejudice and defendant acted in good faith, $20/day for 18 months duration was proper exercise of discretion). This past month, for example, the Third Circuit determined penalties appropriate even when the defendant had acted in totally good faith. Veneziano v. Long Island Pipe Fabrication & Supply, 2003 U.S. App. LEXIS 21735 (3rd Cir. 2003).

Petitioner does not suggest the circuits to be much "split" on the issue, for we have found no case other than the instant one that suggests penalties are inappropriate for a disparager, a word the courts below were unwilling to even use after remand. In the instant case, how could the magistrate judge or Eight Circuit have found Respondents' defiance of COBRA and the fraudulent acceptance of premiums while holding up of payment of bills as "reasonably justified" or in "good faith" when this Court in Geissal I described Respondents' conduct in terms of "no justification for disparaging the clarity of §1162(2)D)(1)," 524 U.S. at 87, and found Respondents suggested "draconian alternatives" to Congressional intent. 524 U.S. at 85. After this Court unanimously determined in the earlier opinion that there was "no justification for disparaging the clarity" of statutory requirements, the Eighth Circuit seemingly challenges this Court to say that Respondents acted "in good faith." 338 F.3d at 934.

The Eighth Circuit puts form over substance. If a notice was issued, however inaccurate as to extensions,

both lower courts ignore the fact that Respondents ignore it from the beginning. They held up billings amounting to over a hundred thousand dollars while collecting Geissal's premiums, misleading Geissal to believe they were good guys concerned about his welfare and thus dissuading him from filing charges with the Equal Employment Opportunity Commission for age and disability violations in connection with his loss of employment. After the time for filing charges with the EEOC had expired, Respondents then rescinded the notice *ab initio*. None of this notice withdrawal is of any interest to the Eighth Circuit.

Respondents' COBRA notice had been rendered nothing more than an illusion. *Cf.* Franconia Associates v. United States, 536 U.S.129, 142-143 (2002) (a promise not intended to be kept is illusory and a repudiation). This Court should not tolerate the evasion of statutory obligations by putting form over substance. See, *e.g.*, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). Congress surely did not intend the issuance of a notice and a right to elect that the Respondents had no intent to effectuate, meets the notice Congress required. Respondents' recision *ab initio* makes the giving itself a nullity.

This Court has suggested in Franklin v. Gwinnett Co. Public Schools, 503 U.S. 60, 76 (1992) that penalties are all the more appropriate where because of intervening events relief can no longer be given. While ERISA and COBRA are not criminal statutes, the fact they these statutes allow penalties and little civil remedy, makes relevant Judge Posner's observations in his recent decision in Mathias v. Accor Economy Lodging, Inc., 2003 U.S. App. LEXIS 21299 (7th Cir. Oct. 21, 2003) which

suggests perhaps what we are looking at may be something like the "civil alternative to criminal prosecution of minor crimes." In the instant case, for six months plaintiff was even paying premiums unaware that billings were being held up and going unpaid, what could be a fraudulent taking of monies save for ERISA preemption.

The Eighth Circuit makes very clear that Respondents are to keep their wrongful gains from paying benefits they avoided paying, which burden they wrongfully shifted to others, even if it cuts down the size of the funding available for participants in the TWA plan that came to the rescue.[5/] If ERISA cuts down on remedies, then the writ should be granted to determine if penalties are appropriate for such blatant acts of misconduct.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the United States Court of Appeals for the Eighth Circuit.

[5/]The evidence is that the TWA plan is a trusteed Taft-Hartley plan with actual funds held by trustees. In contrast, the Moore plan is not a self-funded plan in the sense of having any funds held in trust. The Moore plan is "funded" solely by whatever amount Moore Medical Corporation chooses from time to time to pay to providers our of the corporation's general revenues. The Eight Circuit's suggestion that a restitutional recovery will do harm to the Moore plan is without evidential support, unless the Eight Circuit opinion uses the terms "Moore plan" and "Moore pocketbook" as synonyms. No Moore plan participant is thus endangered by any relief Petitioner seeks.

Respectfully Submitted,

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(Any footnotes trail the end of each document)

No. 02-2255 No. 02-2256

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Bonnie L. Geissal, as personal representative of the Estate of James W. Geissal,
Plaintiff- Appellant/Cross Appellee,

v.

Moore Medical Corporation, et al.,
Defendants-Appellees/Cross Appellants.

February 10, 2003, Submitted
July 31, 2003, Filed

COUNSEL: For Bonnie L. Geissal, Plaintiff - Appellant (No. 02-2255): S. Sheldon Weinhaus, WEINHAUS & DOBSON, St. Louis, MO.

For Moore Medical Corporation, Group Benefit Plan, of Moore Medical Corp., Herbert Walker, Defendants - Appellees (No. 02-2255): Edward M. Goldenhersh, Daniel J. Schwartz, GREENSFELDER & HEMKER, St. Louis, MO.

For Bonnie L. Geissal, Plaintiff - Appellee (No. 02-2256): S. Sheldon Weinhaus, WEINHAUS & DOBSON, St. Louis, MO.

For Moore Medical Corporation, Group Benefit Plan, of Moore Medical Corp., Herbert Walker, Defendants -

Appellants (No. 02-2256): Edward M. Goldenhersh, Daniel J. Schwartz, GREENSFELDER & HEMKER, St. Louis, MO.

JUDGES: Before HANSEN, * Chief Judge, LOKEN and SMITH, Circuit Judges.

OPINIONBY: James B. Loken

OPINION: LOKEN, Chief Judge.

After Moore Medical Corporation ("Moore") terminated employee James Geissal in 1993, he elected to purchase continuation health insurance coverage through Moore's Group Benefit Plan (the "Moore Plan"). Some months later, the Moore Plan canceled this coverage when it determined that Geissal was not entitled to continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), 29 U.S.C. §§ 1161-1169, which amended the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. Geissal sued Moore, the Moore Plan, and its administrator, alleging that he was entitled to at least eighteen months of COBRA coverage. The Supreme Court ultimately agreed and remanded the case for further proceedings.

On remand, addressing questions of remedy, the district court denied Geissal compensatory damages and statutory penalties but granted him an award of $ 217,369.70 in attorney's fees. Geissal's widow appeals on behalf of his estate, seeking money damages, penalties, and additional attorney's fees under 29 U.S.C. § 1132(a), (c), and (g). Moore cross-appeals, arguing that the district court erred in awarding attorney's fees because

Geissal is not a prevailing party. We affirm the district court in all major respects but remand for further consideration of whether the estate should recover unreimbursed medical expenses paid by Geissal or the estate.

I. Background

Throughout Geissal's employment at Moore, Trans World Airlines ("TWA") employed his wife, Bonnie ("Mrs. Geissal"). Geissal as her spouse was covered under TWA's health insurance plan (the "TWA Plan"), which was administered by Aetna Life Insurance Company ("Aetna"). Before Moore terminated Geissal in July 1993, the Moore Plan paid for his ongoing cancer treatments. The Moore Plan is a self-funded employee welfare benefit plan governed by ERISA and COBRA. After Geissal's termination, he elected COBRA continuation coverage under the Moore Plan and made six monthly premium payments of $ 148.51 per month. In January 1994, the Moore Plan cancelled the COBRA coverage and refunded Geissal's premium payments because he was also covered by the TWA Plan during this period.

After the cancellation, Aetna as administrator of the TWA Plan paid nearly all claims for medical expenses incurred by Geissal between the date of his termination and January 17, 1995, when the eighteen-month COBRA continuation coverage period ended. During that period, the TWA Plan paid $86,795.25 to Geissal's health care providers and $ 6,528.65 to Geissal for his covered out-of-pocket expenses. During this same period, Geissal did not seek reimbursement for expenses incurred on a trip to Greece for cancer

treatment, and he incurred $ 4,425.55 in medical expenses that the TWA Plan declined to reimburse.

Geissal commenced this lawsuit in June 1994, seeking compensatory damages for past due COBRA benefits, injunctive and equitable relief, penalties under 29 U.S.C. § 1132(c), and costs and expenses including reasonable attorney's fees. After Geissal died on June 23, 1995, Mrs. Geissal as representative of his estate was substituted as plaintiff. The district court granted summary judgment in favor of the defendants. Geissal v. Moore Medical Corp., 927 F. Supp. 352 (E.D. Mo. 1996). We affirmed, construing the term "first becomes . . . covered under any other group health plan" in 29 U.S.C. § 1162(2)(D)(i) as including Geissal's pre-existing coverage under the TWA Plan. Geissal v. Moore Medical Corp., 114 F.3d 1458 (8th Cir. 1997). The Supreme Court granted certiorari, rejected our interpretation of the statute, and remanded. Geissal v. Moore Medical Corp., 524 U.S. 74, 82, 87, 141 L. Ed. 2d 64, 118 S. Ct. 1869 (1998).

On remand, the principal remedy issue was whether Geissal may recover the substantial health benefits paid on his behalf by Aetna and the TWA Plan. In rejecting this claim, the district court ruled that Geissal's estate was entitled to no monetary relief under 29 U.S.C. § 1132(a). Geissel v. Moore Medical Corp., 158 F. Supp. 2d 976 (E.D. Mo. 2001). The court subsequently denied Mrs. Geissal's motion for an award of statutory penalties under § 1132(c)(1)(A) but granted in part her motion for an award of attorney's fees under § 1132(g)(1). All of these rulings are challenged on appeal. We review the summary judgment rulings de novo. See

Phillips-Foster v. Unum Life Ins. Co. of Am., 302 F.3d 785, 794 (8th Cir. 2002).

II. Monetary Relief

Before turning to the applicable ERISA remedial provisions, it may be helpful to outline the principal issue as to monetary relief -- whether Mrs. Geissal may recover the health benefits paid to Geissal's medical providers by Aetna on behalf of the TWA Plan. The Moore Plan provides that "benefits are not payable for . . . services for which there is no obligation to pay." Defendants argue that Geissal and his estate have no obligation to pay the substantial medical expenses paid by Aetna under the TWA Plan. Mrs. Geissal concedes she has no obligation to reimburse the TWA Plan for paying those expenses but argues she is entitled to recover those benefit payments because the Moore Plan would have paid them but for its wrongful cancellation of Geissal's COBRA continuation coverage. Defendants respond that, assuming the TWA Plan's coverage was secondary to the Moore Plan's primary COBRA coverage, the Moore Plan's coordination of benefits provisions provide a remedy to the secondary insurer, the TWA Plan. But those provisions provide no remedy to the plan participant or beneficiary, who would receive a windfall double recovery if allowed to recover expenses already paid by a third party. Mrs. Geissal replies that the third parties in this case -- which include medical providers who discounted their bills to Aetna, as well as Aetna and the TWA Plan -- have failed to assert timely claims against Moore and the Moore Plan for reimbursement, so she should be entitled to recover on their behalf to prevent the self-

funded Moore Plan from being unjustly enriched by its wrongful denial of COBRA coverage.

Because ERISA preempts state law remedies, the parties agree that Mrs. Geissal's right to this remedy must be found in ERISA's remedial provisions and more particularly in 29 U.S.C. § 1132(a), which provides in relevant part:(a) . . . A civil action may be brought - (1) by a participant or beneficiary –

* * * * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. The district court concluded that Mrs. Geissal is not entitled to monetary relief under either § 1132(a)(1)(B) or § 1132(a)(3)(B). On appeal, she challenges both rulings.

A. Relief Under § 1132(a)(1)(B). The district court concluded that Mrs. Geissal and the estate may not recover plan benefits under § 1132(a)(1)(B) because Geissal, the plan beneficiary, is deceased. 158 F. Supp. 2d at 982. The statute provides that "[a] civil action may be brought . . . by a participant or beneficiary." But we have declined to construe this language as precluding ERISA claims after the participant or beneficiary has

died. In Shea v. Esensten, 107 F.3d 625, 628 (8th Cir.), cert. denied, 522 U.S. 914, 139 L. Ed. 2d 229, 118 S. Ct. 297 (1997), we held that the representative of a deceased participant's estate had standing to sue for breach of ERISA fiduciary duties. In McGee v. Funderburg, 17 F.3d 1122 (1994), we upheld a widow's claim for COBRA continuation benefits without discussing the issue. Addressing the precise question here at issue, the Third Circuit held that an action for benefits under § 1132(a)(1)(B) survives the death of the beneficiary because Congress intended ERISA to be remedial, and "actions that are remedial in nature generally survive the death of a party." Harrow v. Prudential Ins. Co. of Am., 279 F.3d 244, 248 (3d Cir. 2002). We agree. Therefore, the district court erred in ruling that Geissal's estate may not recover Moore Plan benefits under § 1132(a)(1)(B). n1

(1) That brings us to the main issue, whether Mrs. Geissal may recover benefits paid by the TWA Plan. Section 1132(a)(1)(B) provides that a participant or beneficiary may recover "benefits due to him under the terms of his plan." COBRA provides that continuation coverage must be "identical to the coverage provided under the plan to similarly situated beneficiaries." 29 U.S.C. § 1162(1). The Moore Plan provides that "benefits are not payable for . . . services for which there is no obligation to pay." In our view, the plain language of § 1132(a)(1)(B) and the Moore Plan preclude Mrs. Geissal from recovering medical expenses paid by another health insurer. See Larocca v. Borden, Inc., 276 F.3d 22, 30-31 (1st Cir. 2002).

On appeal, Mrs. Geissal argues that § 1132(a)(1)(B) allows her to recover the TWA Plan benefit payments

and the medical provider discounts under a legal restitution theory. As support for this novel theory, Geissal relies upon the Supreme Court's recent decision in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), which held that legal restitution may not be recovered under § 1132(a)(3) because it is not "equitable relief." However, Knudson did not address whether a participant or beneficiary may recover legal restitution under § 1132(a)(1)(B). We doubt that such a remedy is available, because the statute is expressly limited to claims for benefits due "under the terms of the plan." But even if a claim for legal restitution is available under § 1132(a)(1)(B), the Supreme Court limited the theory to a claim in which the plaintiff can "show just grounds for recovering money to pay for some benefit the defendant had received from him." Knudson, 534 U.S. at 213 (emphasis added) (quotation omitted). Here, any unjust enrichment of the Moore Plan resulted from benefits indirectly conferred by third parties, not by Geissal or his estate. Thus, Mrs. Geissal has no claim for legal restitution.

(2) Concluding that Mrs. Geissal may not recover TWA Plan payments and provider discounts does not end our inquiry under § 1132(a)(1)(B). Mrs. Geissal also argues that the Moore Plan is liable for $ 4,425.55 in health expenses paid by Geissal that were not covered by the TWA Plan, n2 and for some $ 9,000 in expenses for cancer treatments in Greece. Defendants argue that Mrs. Geissal is entitled to no recovery whatsoever because $ 1,811.47 of the $ 4,425.55 was for uncovered expenses, the remainder is less than COBRA premiums and deductibles that Geissal would have been required to pay, and the Greek cancer treatments were not

covered expenses because they were "experimental in nature or application." The district court did not resolve these issues because it ruled that an estate may not recover under § 1132(a)(1)(B). As the issues are contested, we remand for further consideration of whether Mrs. Geissal may recover all or any part of these amounts as "benefits due . . . under the terms of his plan." We note that this case is very old, and we encourage the parties to settle this small remaining part of the original dispute. To encourage common sense in this regard, we instruct the district court that any attorney's fee awarded for the proceedings on remand may not exceed one-third of the remaining amounts in controversy.

B. Relief Under Section 1132(a)(3). Alternatively, Mrs. Geissal argues that she may recover TWA Plan payments and provider discounts under 29 U.S.C. § 1132(a)(3)(B), which provides that a participant or beneficiary may obtain "appropriate equitable relief" to redress ERISA violations. Mrs. Geissal argues that this provision entitles her either to equitable restitution or to an order directing the Moore Plan to pay Geissal's medical expenses into a constructive trust for the benefit of the TWA Plan and Geissal's health care providers. n3

As the district court recognized, 158 F. Supp. 2d at 981, we have twice held "that where a plaintiff is 'provided adequate relief by the right to bring a claim for benefits under . . . § 1132(a)(1)(B),' the plaintiff does not have a cause of action to seek the same remedy under § 1132(a)(3)(B)." Conley v. Pitney Bowes, 176 F.3d 1044, 1047 (8th Cir. 1999), cert. denied, 528 U.S. 1136, 145 L. Ed. 2d 930, 120 S. Ct. 979 (2000), quoting Wald v.

Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1006 (8th Cir. 1996); accord Larocca, 276 F.3d at 28-29, and cases cited). As the Supreme Court observed in Varity Corp. v. Howe, 516 U.S. 489, 515, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996), "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" Thus, Mrs. Geissal may not seek to recover these amounts both as benefits due under § 1132(a)(1)(B) and as equitable restitution under § 1132(a)(3).

Mrs. Geissal argues her right to this kind of equitable relief was established by our decision in McGee, 17 F.3d at 1126. We disagree. Our opinion in McGee did not identify the ERISA remedial provision under which we granted COBRA coverage relief. McGee is best viewed as granting relief under § 1132(a)(1)(B). Indeed, if our decision in McGee was based upon the grant of equitable relief under § 1132(a)(3), it was superseded by the Supreme Court's subsequent decision in Varity Corp. as construed by this court in Conley and Wald.

III. Statutory Penalties

COBRA requires that a plan administrator notify any qualified beneficiary "of such beneficiary's rights under [COBRA]" upon the occurrence of a qualifying event. 29 U.S.C. § 1166(a)(4). ERISA remedies include a provision that an administrator who breaches this duty "may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day." 29 U.S.C. § 1132(c).

At termination, Moore sent Geissal a written COBRA notice and election form substantially similar to the Department of Labor model COBRA notice. Mrs. Geissal argues that the Moore Plan administrator is nonetheless liable for § 1132(c) penalties because (i) the notice failed to advise that Geissal would be entitled to an additional eleven months of COBRA coverage if the Social Security Administration determined he was disabled at the time of the qualifying event; and (ii) Moore later revoked COBRA coverage based upon an interpretation of the statute later rejected by the Supreme Court. The district court declined to assess penalties, concluding that Moore's notice was based upon a reasonable interpretation of the law. We review that ruling for abuse of discretion. Chesnut v. Montgomery, 307 F.3d 698, 703 (8th Cir. 2002).

Section 1132(c) authorizes penalties for noncompliance with the notice requirements of § 1166(a)(4). See Chesnut, 307 F.3d at 704. Therefore, the issue under § 1132(c) is whether the plan administrator gave a proper notice, not whether Geissal was improperly denied COBRA continuation coverage. The notice must adequately inform the beneficiary of the COBRA coverage he is entitled to receive (or, in this case, arguably entitled to receive) and the money owed to maintain this coverage. Lincoln Gen. Hosp. v. Blue Cross/Blue Shield, 963 F.2d 1136, 1140 (8th Cir. 1992). Here, the only alleged deficiency in the initial notice was its failure to advise that coverage was available for a longer period if Geissal was disabled on the date of his termination. As we have noted, Geissal was not eligible for this additional continuation coverage. See supra note 2. Mrs. Geissal argues that, with proper notice, Geissal could have persuaded the Social Security

Administration to adopt an earlier onset date, thereby making him eligible. We reject this contention as entirely speculative. Moreover, to trigger the additional coverage, the qualified beneficiary must notify the plan administrator of the disability determination. See 29 U.S.C. § 1166(a)(3) (Supp. I. 1989). Geissal gave no such notice before the Moore Plan administrator sent him the July 1993 COBRA notice. Finally, because Geissal elected continuation coverage, no harm resulted from this alleged notice deficiency. See Chesnut, 307 F.3d at 702. In these circumstances, the district court did not abuse its discretion in refusing to impose § 1132(c) penalties for the Moore Plan administrator's good faith attempt to comply with the COBRA notice requirements.

IV. Attorney's Fee Issues

ERISA's remedial provisions include the discretion to award attorney's fees to either party: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). At the end of this protracted litigation, the district court concluded that Mrs. Geissal was a prevailing party and awarded her $ 217,369.70 in attorney's fees and expenses. In arriving at that amount, the court determined a reasonable fee using the lodestar method and then reduced the fee by fifty percent because of her limited success. On appeal, Mrs. Geissal argues she is entitled to a substantially increased award. In their cross appeal, defendants argue the fee award should be overturned because Mrs. Geissal is not a prevailing party. Reviewing the district court's fee award for abuse of discretion, we reject both

contentions. See Griffin v. Jim Jamison, Inc., 188 F.3d 996, 997 (8th Cir. 1999) (standard of review).

A. Was a Fee Award Proper? In responding to the cross appeal, Mrs. Geissal initially argues that she need not be a prevailing party to receive a fee award under § 1132(g)(1). Though she cites no support for this contention, it is an interesting issue that has received considerable attention in other circuits. See Gibbs v. Gibbs, 210 F.3d 491, 501-03 (5th Cir. 2000) (citing cases discussing attorney's fees in ERISA cases). This court has frequently assumed that only prevailing parties may be awarded fees in ERISA cases. See, e.g., Martin v. Ark. Blue Cross & Blue Shield, 299 F.3d 966, 970-71 (8th Cir. 2002) (en banc), cert. denied, 154 L. Ed. 2d 893, 123 S. Ct. 967 (2003) (overruling the presumption that ERISA prevailing parties are entitled to a fee award); Jackson v. Metro. Life Ins. Co., 303 F.3d 884, 890 (8th Cir. 2002) (vacating a fee award after reversing on the merits). The fact that the statute does not expressly limit fee awards to prevailing parties is significant, but not conclusive. In Ruckelshaus v. Sierra Club, 463 U.S. 680, 693, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983), for example, a divided Supreme Court concluded that "the language and legislative history of § 307(f) [of the Clean Air Act] do not support respondents' argument that the section was intended as a radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees." But we do not read the decision in Ruckelshaus as necessarily meaning that the Court would construe what it has often referred to as "ERISA's carefully crafted and detailed enforcement scheme" the same way. Knudson, 534 U.S. at 209 (quotation omitted). In this case, we agree with the

district court that Mrs. Geissal was a prevailing party for fee award purposes. Therefore, we leave unresolved the question whether, in ERISA cases, a district court may only award attorney's fees to a prevailing party.

Defendants argue that Mrs. Geissal was not a prevailing party because she was granted no relief. We agree with the district court that she became a prevailing party when "she obtained a favorable ruling from the United States Supreme Court that Moore's basis for denying Geissal benefits was invalid." The Supreme Court has expressly recognized that a fee award may be appropriate when a party "has established the liability of the opposing party, although final remedial orders have not been entered." Hanrahan v. Hampton, 446 U.S. 754, 757, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980). To be sure, such an interlocutory order must create a "material alteration of the legal relationship of the parties" to confer prevailing party status. Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792-93, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989). That test is satisfied by the Supreme Court's ruling that Geissal was entitled to COBRA continuation coverage. This ruling would have entitled Geissal to injunctive relief had the coverage period then been unexpired, and it entitled his estate to seek monetary relief under § 1132(a)(1)(B), which for the most part it was unable to prove.

B. Was the Fee Award an Abuse of Discretion? In determining the amount of attorney's fees to award, the district court first applied the five-factor test set forth in Lawrence v. Westerhaus, 749 F.2d 494, 495-96 (8th Cir. 1984), and then applied the lodestar method to calculate a reasonable fee. Mrs. Geissal argues the court

abused its discretion when it set lead counsel's lodestar rate at $ 250 per hour, rather than the $ 350- $ 500 per hour requested; when it failed to enhance the lodestar rate; and when it reduced the award by fifty percent because of her limited success in the litigation. After careful review of the record, we reject these contentions. The Supreme Court's favorable ruling came nearly three years after Geissal died. Mrs. Geissal's attorneys then spent approximately 750 hours pursuing novel damage theories that were determined to be almost totally without merit. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Hensley v. Eckerhart, 461 U.S. 424, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Here, Mrs. Geissal prevailed on the question of liability and then wasted valuable resources of all the parties, including an ERISA plan, in litigating monetary remedy questions that should have been settled. The district court did not abuse its discretion in reducing by fifty percent the award determined by the lodestar method.

The judgment of the district court is reversed and the case is remanded for further consideration of the issues discussed in Part II.A.(2) of this opinion. In all other respects, the judgment of the district court is affirmed. Appellant's Motion To Strike Supplemental Appendix is denied.

FOOTNOTES

* The Honorable David R. Hansen stepped down as Chief Judge at the close of business on March 31, 2003, succeeded by the Honorable James B. Loken.

n1 The district court relied for its contrary conclusion on Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196, 198 (1st Cir. 1997), cert. denied, 523 U.S. 1072, 140 L. Ed. 2d 666, 118 S. Ct. 1512 (1998), and on Bast v. Prudential Insurance Co. of America, 150 F.3d 1003, 1009 (9th Cir. 1998), cert. denied, 528 U.S. 870, 145 L. Ed. 2d 144, 120 S. Ct. 170 (1999). But those cases involved claims for money damages for the beneficiary's death after the plan denied coverage for a medical procedure the beneficiary could not afford. The courts decided that § 1132(a)(1)(B) does not permit a damage action for breach of the plan, only for benefits due under the plan. They did not decide the issue in this case, whether a beneficiary's estate may recover money benefits due under the plan before the beneficiary died.

n2 This amount does not include unreimbursed medical expenses Geissal incurred between the end of the eighteen-month COBRA period and June 23, 1995, the date of his death. Mrs. Geissal argues the Moore Plan is liable for these expenses because he was entitled to an additional eleven months of COBRA coverage when the Social Security Administration determined in March 1994 that Geissal was disabled as of September 3, 1993. We disagree. The COBRA provisions in effect at the time Geissal was terminated granted eleven additional months of continuation coverage to a qualified beneficiary "who is determined, under title II or XVI of the Social Security Act . . . to have been disabled at the time of a qualifying event," here, termination. 29 U.S.C. § 1162 (2)(A)(iii) (Supp I. 1989) (emphasis added). As Geissal was not disabled when he was terminated on July 17, 1993, he did not qualify for the additional eleven months of COBRA coverage.

n3 Geissal first suggested the constructive trust remedy in the middle of her lengthy, scatter-gun reply brief. The theory is unsound, in part because it is not "appropriate" equitable relief to make the plan beneficiary's estate a constructive trustee for third parties who could have, but did not, assert their own rights against the beneficiary and/or the Moore Plan. See Larocca, 276 F.3d at 31; Lutheran Med. Ctr. v. Contractors Health & Welfare Plan, 25 F.3d 616, 619 (8th Cir. 1994); Winstead v. J.C. Penney Co., 933 F.2d 576, 579-80 (7th Cir. 1991).

No. 4:94 CV 1263 DDN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BONNIE L. GEISSAL,
Plaintiff,

V.

MOORE MEDICAL CORP., GROUP BENEFIT PLAN OF MOORE MEDICAL CORP., AND HERBERT WALTER,
Defendants.

MEMORANDUM

March 29, 2002

This action is before the court upon the motion of plaintiff for the imposition of penalties (Doc. No. 167), for an award of attorneys' fees and costs against defendants (Doc. No. 169), and for reconsideration of the decision denying monetary relief (Doc. No. 198).

Defendants argue that plaintiff is not entitled to penalties, and that she is not entitled to fees or costs, because she is not the prevailing party. Defendants argue, alternatively, that the fees and costs claimed are excessive.

The parties consented to the exercise of plenary authority by the undersigned Magistrate Judge under

28 U.S.C. § 636(c). A hearing was held on January 14, 2002.

BACKGROUND

James Geissal, the late husband of plaintiff Bonnie L. Geissal, commenced this four-count action under the Employee Retirement Income Security Act (ERISA), as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1996 (COBRA). Defendants are Geissal's former employer, Moore Medical Corporation; the Group Benefit Plan of Moore Medical Corporation; and Herbert Walter, the Plan Administrator (collectively, Moore). Count I claimed that Moore violated COBRA by failing to provide James Geissal with continuation health insurance coverage after terminating his employment. Count II claimed that Moore was estopped from denying Geissal COBRA coverage, because he relied on its initial representation that he was entitled to such coverage. Count III claimed that Moore's misrepresentation waived any right to assert a reading of the plan that would deprive Geissal of continuation coverage. Count IV claimed that plan administrator Walter violated COBRA by failing to provide Geissal with certain requested plan documents.

On July 16, 1993, Moore terminated James Geissal from employment. At that time, he was 62 years old and had cancer. During his employment at Moore, Geissal was a participant in the employee health benefits plan sponsored by Moore, a plan subject to ERISA and COBRA. The plan or its reinsurer paid large sums for medical care provided to Geissal prior to his termination.

While he was employed by Moore, Geissal was covered also by the group health plan provided by his wife's employer, Trans World Airlines (TWA), through Aetna Life Insurance Company. Upon his termination from Moore, Geissal received notice of his right under COBRA to continue health insurance coverage for 18 months under Moore's plan. He elected to continue this coverage and began making premium payments, which Moore accepted.

Approximately six months after his termination, relying upon 29 U.S.C. § 116 (2)(D)(i),[1] Moore informed Geissal that he was not entitled to continuation coverage under COBRA, because he had been already covered under the Aetna group policy. The COBRA premiums Geissal had paid were returned. The cost of most[2] of the medical care Geissal received after his termination was not paid by the Moore plan, but by the TWA/Aetna plan.

After limited discovery, Geissal moved for summary judgment on Counts I and II of the complaint. He argued that Moore's reliance on § 1162 (2)(D)(i) was misplaced, because he was covered under the TWA plan before he elected COBRA continuation coverage, not after. In any event, Geissal maintained, Moore was estopped from denying him continuation health benefits, because he had detrimentally relied upon its assurances that he was entitled to these benefits. While the summary judgment motion was pending, on June 23, 1995, Geissal died of cancer. Bonnie Geissal, his wife and personal representative of his estate, was substituted for him as plaintiff in this action.

In March 1996, this court denied Geissal's motion for summary judgment on Counts I and II, and granted summary judgment for Moore on these counts. Geissal v. Moore Med. Corp., 927 F. Supp. 352, 361 (E.D. Mo. 1996). On Count I, the court concluded that under § 1162(2)(D)(i) an employee with coverage under another group health plan as of the date he elects COBRA continuation coverage is ineligible four COBRA coverage. On Count II, the court held that Geissal had presented insufficient evidence of detrimental reliance on Moore's initial representation that he was entitled to benefits under COBRA. On interlocutory appeal, the Eighth Circuit Court of Appeals affirmed. Geissal v. Moore Med. Corp., 114 F.3d 1458 (8th Cir. 1997).

The United States Supreme Court granted Geissal's petition for certiorari in order "to resolve a conflict among the Circuits on whether an employer may deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary covered under another group health plan at the time he elects coverage under COBRA." Geissal v. Moore Med. Corp., 524 U.S. 74, 79 (1995). On June 8, 1998, the Supreme Court reversed. and remanded the action. The Court held that the existence of other coverage did not disqualify James Geissal from being a "covered employee" or a qualified beneficiary of the Moore plan under ERISA. Id. It held that Moore was obligated to provide Geissal with coverage under COBRA, because the language of § 1162(2)(D) (i) clearly referred only to coverage added after COBRA was elected. Id. at 84-86. The Supreme Court's ruling related to the Count I claim; the denial of relief on the Count II claim was left undisturbed. By separate order, the Supreme Court awarded Bonnie

Geissal printing costs and clerk's costs in the amount of $2,302.55.

On August 31, 1998, plaintiff moved this court for reconsideration of her motion for summary judgment on (a) the main issue of Moore's obligation to have provided COBRA coverage to James Geissal, (b) whether Moore provided Geissal with a valid notice of his rights, (c) whether Moore actually covered Geissal as the law required, (d) whether Moore was justified for not providing the required notice and coverage, and (e) whether Moore should pay Geissal restitution of unpaid benefits, statutory penalties, fees, and costs.

On March 23, 1999, consistent with the rulings of the Supreme Court and the Eighth Circuit Court of Appeals on remand, this court held that Moore was obligated to provide COBRA coverage to Geissal. The court, however, ruled that the balance of the relief sought by plaintiff, monetary damages, penalties, fees and costs, must await further fact finding proceedings. Thereafter, the parties engaged in discovery litigation, plaintiff unsuccessfully moved to disqualify defendants' counsel, and the parties sought summary judgment on plaintiffs claims.

On August 4, 2000, the parties filed cross-motions for partial summary judgment on Geissal's Count I claim for damages. Geissal argued that Moore had been unjustly enriched in the amount of approximately $145,000 by its failure to provide COBRA benefits to James. Therefore, Geissal argued, she was entitled to "other appropriate equitable relief," as provided for by 29 U.S.C. § 1132(a)(3),[3] in the form of restitution. Geissal submitted documentation that James had

incurred approximately $9,000 in expenses for the trip to Greece. She argued that she was entitled to recover this amount under the Moore plan provision that covered alternative medical treatments that are cost-effective and "in accordance with accepted standards of medical practice." Geissal submitted published articles describing the immunology treatment provided in Greece.

Moore argued that Geissal was not entitled to any monetary relief. Under 29 U.S.C. 1132(a)(1)(B)[4] and the Moore plan, her damages were limited to the unreimbursed out-of-pocket medical expenses covered under the Moore plan, assuming James had been provided with COBRA continuation coverage, less the deductible and premium payments that would have been due Moore for such coverage. The amount of his unrelmbursed[5] expenses from July 17, 1993, through January 17, 1995, was $2,614.08, which is less than the $2,973.18 in deductibles and premiums that would have been due Moore.

Moore argued that the unreimbursed medical expenses for the trip to Greece were not covered under the Moore plan, because they were excluded as experimental, unapproved treatments. Moore submitted articles establishing that the "'Greek Cancer Cure" did not meet the usual medical industry standards.

Moore argued that any claim TWA/Aetna may have against Geissal for reimbursement, if Moore were to pay Geissal now for expenses already paid by TWA/Aetna, would be barred by the statute of limitations. Furthermore, any claim TWA/Aetna may

have against Moore was between those two parties. Therefore, argued Moore, to allow Geissal to recover for expenses paid by TWA/Aetna would present a windfall to Geissal. Lastly, Moore argued that the relief sought by Geissal was not "equitable relief" within the meaning of § 1132 (a)(3).

On March 29, 1999 (Doc. No. 158), this court denied Geissal's motion for summary judgment and sustained Moore's motion for summary judgment on Count I's claim for damages. The court reasoned that, because James Geissal died, benefits under the plan were no longer recoverable under § 1132(a)(1). The court then considered the propriety of "other appropriate equitable relief' under § 1132(a)(3) and determined that an award of restitution in this case would be the equivalent of awarding compensatory damages, which would be contrary to the holding In Mertens v. Hewitt Assocs., 508 U.S. 248, 256-58 (1993), that § 1132(a)(3) recovery is limited to classic equitable remedies. The court recognized that this left Geissal without relief against Moore, a consequence of the failure of Congress to amend ERISA to reflect the changing realities of insurance and health care practices. Counts II and III were dismissed as moot, and the penalties sought in Count IV, as well as the issue of attorneys' fees, were reserved for later resolution. At a hearing held on January 14, 2002, Geissal voluntarily abandoned her claim in Court IV, and this count will be dismissed.

RECONSIDERATION OF MARCH 29, 2001. ORDER

In her sur-rebuttal memorandum in support of the motion for attorneys' fees and costs, discussed below, Geissal invites the court to reconsider the March 29,

2001, grant of summary judgment to Moore on her Count I. In doing so, Geissal adverts to a recent decision of the first Circuit, LaRocca v. Borden Inc., 276 F.3d 22 (1st Cir. 2002). LaRocca supports this court's determination that forcing Moore to pay Geissal the costs of James's medical expenses during the COBRA period is not a form of equitable relief available under ERISA. In that case, retirees who were improperly terminated from their former employer's ERISA health plan sought, in addition to reinstatement in the plan, the amount by which the employer was "unjustly enriched" by failing to pay for insurance coverage after the improper terminations. Relying on Merten, 508 U.S. at 256, the First Circuit held that this relief was not available under § 1132(a)(3). 276 F.3d at 27-29.

By her later motion for reconsideration (Doc. No. 198), Geissal has directed the court's attention to several other reported opinions, including Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708 (2002). Geissal invokes the statement in Knudson that by its enactment of ERISA

Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan," without reference to whether the relief sought is legal or equitable. 29 U.S.C. § 1132 (a)(1)(B)(1994 ed.).

122 S. Ct. at 718. This court held, however, that after James Geissal died, benefits under the plan were no longer recoverable under 29 U.S.C. § 1132(a)(1), citing Turner v. Fallon Community Health Plan, 127 F.3d 196, 198 (1st Cir.1997), cert. denied, 523 U.S. 1072 (1998); Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1010

(9th Cir. 1998), cert. denied, 528 U.S. 870 (1999); and Foster v. Blue Cross and Blue Shield of Michigan, 969 F. Supp. 1020, 1029 (E.D. Mich. 1997). Plaintiff Bonnie L. Geissal, even as the representative of James Geissal's estate, is not a participant or beneficiary of the Moore plan and thus is not able to sue for plan benefits under § 1132(a)(1)(B). LaRocca, 276 F.3d at 32.

Geissal urges the court to follow McGee v. Funderburg, 17 F.3d 1122 (8th Cir. 1994), by holding that unpaid, covered medical expenses may be recovered by the widow of a beneficiary. McGee dealt only with whether the COBRA coverage was wrongfully terminated because he was covered by another health plan. The court therein did not at all discuss the survivability of a beneficiary's past due benefits, which is the issue Geissal is asking the court to revisit.

Geissal directs the court's attention to Harrow v. Prudential. Ins. Co. of Am., 279 F.3 d 244 (3rd Cir. 2002). Therein, following the death of the original plaintiff and plan beneficiary, his surviving wife and administratrix of his estate, sought in part to recover an unpaid, covered medical expense. Before affirming the dismissal of the action for plaintiff's failure to exhaust administrative remedies, the Third Circuit Court of Appeals, without extended discussion, ruled that the decedent's claims under ERISA survived his death and may be pursued by his widow. 279 F.3d at 248. This court, however, continues to be persuaded by the contrary holding of the First Circuit in Turner, supra, that plan benefits are no longer available after the death of the beneficiary. See also LaRocca, 276 F.3d at 32; Foster, 969 F. Supp. at 1029.

Looking alternatively to 29 U. S. C. § 1132(a)(3) for the recovery of unpaid plan benefits as equitable restitution, Geissal invokes the treatment of equitable relief by the Supreme Court its Knudson, supra, Rather than undermining the authority of Mertens, 508 U.S. at 256-58, Knudson reaffirms it. In Knudson, the Supreme Court held that "other appropriate equitable relief" available under § 1132(a)(3) refers only "'to those categories of relief that were typically available in equity . . . .'" 122 S. Ct. at 712 (quoting Mertens, 508 U.S. at 256). This is not a case, as Geissal argues, of Moore acquiring legal title to property, including money, under circumstances which render it unconscientious for Moore to retain the money. Id. at 715-16. Here Gissal seeks specific performance of an alleged past due monetary obligation, relief that was not typically available in equity. See id. at 713.

Other cases cited byGissal are inapposite. Harris Trust and Savings Bank v. Solomon Smith Barney Inc., 530 U.S. 238 (2000) (suit brought under 29 U.S.C. § 1132 (a)(3) against a nonfiduciary party in interest based on a transaction prohibited by ERISA); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999) (lost investment opportunity consequential damages are compensatory damages not available for a breach of fiduciary duties); and Kwatcher v. Mass. Serv. Employees' Pension Fund, 879 F.2d 957, 967 (1st Cir.1989)(involved in part a claim for the return of mistaken payments of retirement fund contributions).

The court stands by its earlier grant of summary judgment to Moore on Geissal's Count I claim for monetary damages.

PLAINTIFF'S MOTION FOR PENALTIES

Plaintiff Geissal seeks penalties under ERISA, 29 U.S.C. § 1132(c)(1)(A), which provides

Any administrator who failed to meet the requirements of paragraph (1) or (4) of § 606 [to provide written notice of COBRA rights] . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure . . . .

See 29 U.S.C. § 1132 (c) (1)(A). Geissal argues that Moore is subject to penalties, because it wrongly revoked the COBRA notice and never reissued a proper notice. She also argues that the COBRA notice was defective for not advising James of his right to an additional 11 month continuation period, because he was disabled. She also asserts that penalties are warranted, because Moore did not change its COBRA notice to other employees covered by other group insurance plans at the time of their COBRA election. Geissal seeks penalties of $100 per day for the 706 days from James's termination until his death, or "until the present time or until the time defendants establish correction of their COBRA notices." See Memorandum in support of motion for penalties at 8.

The court concludes that this is not a proper case for penalties under § 1132(c)(1)(A). Moore's revocation of the initial notice it issued James Geissal was based on a reasonable interpretation of the law as it stood at that time. The Supreme Court ultimately held that the initial notice was correct. The court does not believe it would be equitable to impose a penalty now for

revocation of that notice; the matter was fairly litigated in good faith by the parties. Nor does the court believe that Moore should pay Geissal penalties based on Moore's allegedly improper COBRA notice to other plan beneficiaries.

Therefore, the motion for the imposition of penalties is denied.

PLAINTIFF'S MOTION FOR ATTORNEYS' FEFS, COSTS AND EXPENSES

Geissal seeks substantial attorneys' fees, plus costs and expenses, as the prevailing party in this action. Geissal has submitted documentation for hours worked and hourly rates, as follows:

Sheldon Weinhaus (lead counsel):	$355-$500/hr.	x	1,237.03 hrs.
Jerome Dobson:	$225-$250/hr.	x	29.75 hrs.
Jonathan Berns:	$175/hr.	x	52.58 hrs.
Gregory Rich:	$125lhr.	x	6.17 hrs.
Scott Holwitt:	$1251hr.	x	4.34 hrs.
Jerry Rappold (paralegal):	$75/hr.	x	17.6 hrs.
Mark Moreland:			2.42 hrs.
Robin Thebeau:			3.50 hrs.
Paula Weinman:			1.65 hrs.
Carol Bewig:			.42 hrs.

The amounts claimed for Washington, D. C., counsel hired to aid with the Supreme Court portion of the case are as follows:

January 29, 1998 through August 20, 1998 (Exhibit 1)

Marc Greidinger	$275/hr.	x	280.52 hrs.	=	$77,143.00
David Hominik	$275/hr.	x	4.20 hrs.	=	$1,155.00
F. Phillips Gilliam	$210/hr.	x	4.10 hrs.	=	$861.00
James Winn	$85/hr.	x	24.75 hrs.	=	$2,103.75
David Drummy	$75/hr.	x	10.00 hrs.	=	$750.00
Robin Campo	$95/hr.	x	16.00 hrs.	=	$1,056.00

October 20, 2000, through August 28, 2001 (Exhibit 2)

Marc Greidinger	$230/hr.	x	140.55 hrs.	=	$32,326.50

Geissal has also submitted documentary support for the opinion that attorney Weinhaus is a highly regarded expert in ERISA law and should be compensated at a rate not less than that of senior partners in law firms in the St. Louis metropolitan area.

Geissal also has documented total expenses in the amount of $31,534.04, of which Moore has paid $2,808.24. She now seeks the remaining $28,725.85.

Prevailing party

Moore argues that Geissal is not entitled to attorneys' fees, because she did not obtain any direct benefit as a result of this litigation. Geissal maintains that the root of the action was the question of an employer's obligation to provide COBRA coverage to a terminated employee who was covered under his spouse's group plan at the time of termination. She asserts that this suit served as a catalyst for a change in the law which will benefit many employees. Geissal argues that the fact that the Supreme Court awarded her costs establishes that she is the prevailing party. Geissal also argues that she is entitled to fees under the five-factor analysis, discussed below, for determining entitlement to attorneys' fees in an ERISA action.

ERISA section 502 (g)(l) provides that "[i]n any action under this subchapter [other than an exception not relevant here] by a participant, beneficiary, or fiduciary, the court in its discretion may allow reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The statute does not state that fees may be awarded only to a prevailing party, and there is a split of judicial authority on this issue. The Eighth and the First Circuits appear to assume that only a prevailing party may recover attorneys' fees under ERISA's fee-shifting provision. See, e.g., Brown v. Seitz Foods, Inc. Disability. Benefit Plan, 140 F.3d 1198, 1201 (8th Cir. 1998); Cottrill v. Sparrow, Johnson & Ursilo, Inc., 100 F.3d 220, 225 (1st Cir.1996).

The Fourth, Seventh, and Ninth Circuits expressly have held that only a prevailing party may be

considered for attorneys' fees in an ERISA action. See Quinn v.. Blue Cross & Blue Shield Ass'n, 161 F.3d 472, 478 (7th Cir. 1998); Martin v. Blue Cross Blue Shield of Va.. Inc., 115 F.3d 1201, 1210 (4th Cir.)(collecting cases), cert. denied, 522 U.S. 1029 (1997); Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246, 1253 (9th Cir. 1993) ("Plaintiffs cannot recover fees under section 1132(g)(1) until they succeed on [some] significant issue in litigation which achieves some of the benefit . . . sought in bringing the suit"). On the other hand, the Fifth Circuit recently reached the opposite conclusion in Gibbs v. Gibbs, 210 F.3d 491, 501-03 (5th Cir. 2000)(collecting cases and holding that a party need not prevail to be eligible for an award of attorneys' fees under § 1132(g)(1)).

Especially in light of the earlier Eighth Circuit precedent, this court believes that the better view is that a party must be considered a prevailing party for entitlement to fees in an ERISA action. See Brown, 140 F.3d at 1201.

To assess the parties' arguments over whether Geissal is a prevailing party in this action for fee-shifting purposes, the court must look beyond the general principle that, for purposes of federal fee-shifting statutes, a prevailing party is one xvho receives a judgment on the merits. Buckhannon Bd. & Care Home v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001). Here plaintiff seeks attorneys` fees for litigating both successful and unsuccessful claims.

The court rejects Moore's argument that, because Geissal ultimately did not recover any monetary damages, she is not a prevailing party and is entitled to

no fees at all. Although she did not prevail on her claim for monetary damages, penalties, or "other equitable relief," Geissal prevailed on a significant aspect of this case -- she obtained a favorable ruling from the United States Supreme Court that Moore's basis for denying Geissal benefits was invalid, and judgment on the merits of that claim was entered in her favor in this court on March 23, 1999. This was a judgment that "materially altered [Moore's] policy limiting the rights [of its employees]." Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 793 (1989). The Supreme Court's ruling in this case immediately altered the specific legal relationship between Geissal and Moore; absent other considerations, which proved to be determinative, Moore was held to have wrongly terminated James Geissal's continuing health insurance coverage. Jenkins v. State of Missouri, 127 F.3d 709, 713 (8th Cir. 1997).

The court concludes that plaintiff Geissal is a prevailing party in this action for fee-shifting purposes. The court also concludes that she is entitled to fee-shifting consideration under 29 U.S.C. § 1132(g)(1).

In Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980), the Eighth Circuit held that a prevailing plan participant "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id. at 1356. Several years later, the Eighth Circuit set forth five factors a court should consider in deciding whether to award fees to a prevailing party in an ERISA case:

(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an

award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties could deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

Lawrence v. Westerhaus, 749 F. 2d 494, 495-96 (8th Cir. 1984); see also Dodson v. Woodmen of the World Life Ins. Soc'y, 109 F.3d 436, 440 (8th Cir. 1997).

In Martin v. Arkansas Blue Cross Blue Shield, 270 F.3d 673 (8th Cir. 2001) (per curiam), a panel held that "merely finding that the live factors favor the` plan does not amount to special circumstances that would make are award unjust." Id. at 676 (reversing the denial of fees to a prevailing ERISA plaintiff where the district court failed to consider the Landro presumption in favor of awarding fees to a prevailing plaintiff absent special circumstances). This decision has been vacated and submitted to the Eighth Circuit en banc. Oral argument was held on January 15, 2002, and to date, no decision has been. issued. Thus, the continued validity of the five-factor test, as well as of the Landron presumption, are under consideration.

Under the Lawrence v. Westerhaus factors, the court concludes that Geissal generally is entitled to an award of attorneys' fees. The first of the factors does not call for an award of fees. The court does not discern in this case "culpability or bad faith" on the part of Moore. However, the remaining four factors support an award. On the second factor, Moore has not factually

contradicted Geissal's argument that it is able to satisfy a reasonable fee award; the court recollects no information during this litigation that Moore is in any way insolvent. On the third factor, an award of reasonable attorneys' fees would likely have a deterrent effect upon plans incorrectly denying benefits. Regarding the fourth factor, this litigation resolved a significant legal question regarding ERISA itself; the Supreme Court's ruling in this case will benefit a wide class of ERISA plan beneficiaries. Regarding the fifth factor, the relative merits of the parties' positions were close, until the Supreme Court resolved a split in the circuits. Then, as noted above, Geissal ultimately prevailed on the question of whether Moore's basis for denying Geissal benefits was valid.

On balance, primarily because Geissal prevailed before the Supreme Court on a significant issue, she is a prevailing party entitled to reasonable counsel's fees and expenses. It remain for the court to determine what fee is "reasonable."' Hensley, 461 U.S. at 433.

Lodestar method

The lodestar method is applicable to calculating reasonable attorney's fees in this action. See Emmenegger v Bull Moose Tube Co., 33 F. Supp. 2d 1127, 1138 (E.D.Mo. 1998), aff'd, 197 F.3d 929 (8th Cir.1998); see also City of Burlington v. Dague, 505 U.S. 557, 562 (1.992)(in applying various federal fee-shifting statutes, there is a "strong presumption" that the lodestar represents the "reasonable fee"); Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir, 2000) (the lodestar approach is the proper method for determining attorneys' fees in an ERISA case).

In the lodestar method, the court first determines the lodestar amount by multiplying the number of hours reasonably expended on the litigation by reasonable hourly rates. Hensley, 461 U.S. at 433. The party seeking an award of fees must submit evidence supporting the hours worked and the rates claimed. Id. The court should exclude from the lodestar amount hours that are not reasonably expended because they are "excessive, redundant, or otherwise unnecessary." Id. at 434.

Reasonable hours

Attorney Weinhaus seeks compensation far 1,237.03 hours representing plaintiff in this action.

Non – legal, clerical work

Moore points out instances in which it argues that attorney Weinhaus performed non-legal, clerical work during the relevant time period. See Exhibit 4 to Defs' Memorandum (Doc. No. 183), filed November 13, 2001. Clerical work by counsel is not recoverable as an attorney's fee. Emmenegger, 33 F. Supp. 2d at 1138. The court has studied these record entries and agrees with Moore only with respect to the entries set out in Appendix A to this opinion. These entries total 31.33 hours.

The remaining entries record work that appears to have been substantially attorney work in nature, although it may have included incidental, office administrative or support work. It is now common for attorneys themselves reasonably to use office automation equipment to perform tasks which might

have been assigned to secretaries and support staff. When the evidence indicates that, for a given billing entry the work performed was substantially attorney work, the entry ought to be compensable fully as such, even though incidental, apparently clerical work also was performed by the attorney. Where the entry indicates that the work performed by the attorney was largely clerical, even though in support of an attorney work-product effort, it ought not be compensable at an attorney's rate. The facts of each case will differ.

Paralegal – type work

Moore argues that on other occasions, attorney Weinhaus performed paralegal-type work for which he should not be compensated at an attorney's rate. See Exhibit 5 to Defs' Memorandum (Doc. No. 183), fled November 13, 2001. The court has studied these record entries and agrees with Moore only with respect to the entries set out on Appendix B to this opinion. These entries total 17.60 hours.

These entries were for work that did not require licensed attorney expertise and ought not be compensated at such a rate. The court concludes that a reasonable fee-shifting rate for the paralegal-type work performed by attorney Weinhaus is one-half the reasonable attorney's rate for him determined by the court below.

Duplicative attorney work

Moore argues further that Geissal is claiming instances in which more than one attorney worked together on the same matter. The court generally agrees that the

cost of duplicative attorney effort ought not be shifted to the non-prevailing party. See Emmenegger, 33 F. Supp. 2d at 1139. However, attorney conferences and the exchange of ideas can reduce unproductive effort. Id. Moore applies this argument to the work of St. Louis attorney Jerome Dobson, a partner of Mr. Weinhaus, and Washington attorney Marc Greidinger,[6] who prepared the briefs submitted to the Supreme Court. Moore characterizes their efforts as merely duplicative of Mr. Weinhaus's work. After carefully reviewing the entries identified by Moore, the court disagrees with Moore and finds that the indicated conferencing is recoverable. Such work has not been shown to have been merely duplicative.

The preparation of briefs before the Supreme Court is sufficiently specialized in nature to warrant fee-shifting compensation. Therefore, even though attorney Weinhaus was qualified to draft and file the required briefs alone, but did not, the court will authorize the shifting to Moore of attorney Greidinger's billing.

Non – legal, supportive efforts

Moore argues that Geissal claims attorney time spent investigating the availability of others to participate in or to confer with in the litigation and in performing non-attorney work such as conferring with the estate of the original plaintiff about the retention of counsel. See Exhibit 7 to Defs' Memorandum (Doc. No. 183), filed November 13, 2001. Such administrative work is non-legal in nature and, while possibly necessary to the financial or other support of the litigation, ought not be a fee shifted to the defendants. Upon review of this record, the court agrees with Moore with respect to the

following entries which are set out in Appendix C to this opinion. These hours total 76.66.

In sum, upon careful consideration, the court concludes that Geissal is entitled to the attorney time claimed, except that described in Appendix C.

Reasonable rates

The court has carefully studied the documentary evidence submitted by Geissal and Moore regarding reasonable rates. Given Mr. Weinhaus's substantial expertise in ERISA beneficiary matters, the court will award him a rate of $ 250 per hour for his work in this action. From the same record, the court awards attorney Dobson a reasonable rate of $200 per hour. See Exhibits 9 and 10 to Affidavit of Plaintiff's Lead Counsel, filed July 31, 2001. The court also finds that the rates claimed for attorney Greidinger and the remaining attorneys and paralegals are reasonable. The individuals whose rates are not noted by Geissal shall be compensated at $60 per hour.

Thus, the reasonable numbers of hours of attorney effort and the reasonable rates for the attorneys and paralegals are a follow:

Sheldon Weinhaus:	$250/hr.	x	1111.44 hrs.	=	$277.860.00
Sheldon Weinhaus:	$125/hr.[7]	x	17.60 hrs.	=	$2,200.00
Jerome Dobson:	$200/hr.	x	29.75 hrs.	=	$5,950.00

Jonathan Berns:	$175/hr.	x	52.58 hrs.	=	$9,201.50
Gregory Rich:	$125/hr.	x	6.17 hrs.	=	$771.25
Scott Holwitt:	$125/hr.	x	4.34 hrs.	=	$542.50
Jerry Rappold (paralegal):	$75/hr.	x	17.66 hrs.	=	$1,324.50
Mark Moreland:	$60/hr.	x	2.42 hrs.	=	$145.20
Robin Thebeau:	$60/hr.	x	3.50 hrs.	=	$210.00
Paula Weinman:	$60/hr.	x	1.65 hrs.	=	$99.00
Carol Bewig:	$60/hr.	x	.42 hrs.	=	$25.20
					$298,329.15

January 29, 1998, through August 20, 1998

Marc Greidinger	$275/hr.	x	280.52 hrs.	=	$77,143.00
David Hominik	$275/hr.	x	4.20 hrs.	=	$1,155.00
F. Phillips Gilliam	$210/hr.	x	4.10 hrs.	=	$861.00
James Winn	$85/hr.	x	24.75 hrs.	=	$2,103.75
David Drummy	$75/hr.	x	10.00 hrs.	=	$750.00

Robin Campo	$95/hr.	x	16.00 hrs.	=	$1,056.00
					$83,068.00

October 20, 2000, through August 28, 2001

Marc Greidinger	$230/hr.	x	140.55 hrs.	=	$32,326.50

TOTAL ATTORNEYS' FEES = $413,723.65

COSTS AND EXPENSES

In the application of Federal Rule of Civil procedure 54(d), which authorizes the award of costs to a prevailing party, the court must carefully scrutinize the claimed costs and the support offered for them. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 232-33, 235 (1964); Koppinger v. Cullen-Schultz & Assoc., 513 F.2d 901, 911 (8th Cir.1975). Generally, in a civil action only those items of costs authorized by 28 U.S.C. § 1920[8] may be taxed by the court. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444-45 (1987). The same definition of costs applies to both § 1920 and to ERISA (29 U.S.C. § 1132(g)). Emmenegger, 33 F. Supp. 2d at 1132.

In the application of a fee-shifting statute, however, "a reasonable attorney's fee" includes the factors that produce the attorney's work product, including

the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney

bills her client; and it must also take account of other expenses and profit.

Id. at 1133 (quoting Missouri v. Jenkins, 491 U.S. 274, 285 1989)). The reasonable attorney's fee "must include 'reasonable out-of-pocket expenses of the kind normally charged to clients by attorneys.'" Id. (citing Pinkham v. Camex, Inc., 84 F.3d 292, 294-95 (8th Cir.1996)). Such, expenses can include long distance telephone calls, facsimile transmissions, messenger services, express mail, deposition related travel expenses, photocopying expenses, and court reporter fees for transcripts. Id. at 1133-36 (collecting cases).

Moore objects to the following costs and expenses claimed by Geissal:

(a) long-distance telephone calls, Federal Express and local delivery services, miscellaneous office expenses, PACER automated internet information gathering, and postage. See Exhibit 11, attached to Defs' Memorandum (Doc. No. 183), filed November 13, 2401;

(b) $226.87 expended by attorney Greidingr for Federal Express charges, postage, mileage, and telephone calls. See Exhibit 12, attached to Defs' Memorandum (Doc. No. 183), filed November 13, 2001; and

(c) $1,367.64 for WestLaw computer assisted legal research. See Exhibit 11, attached to Defs' Memorandum (Doc. No. 183), filed November 13, 2001.

The court disagrees with Moore regarding (a) and (b). Although they are not recoverable costs under 28 U.S.C. § 1920, see Hollenbeck v. Falstaf, Brewing

Corp., 605 F. Supp. 421, 439 (E.D. Mo. 1984), aff'd 780 F.2d 20 (8th Cir. 1985), these are expenses that are attorney would be expected to bill to his client separately, and as such may be shifted to Moore under 29 U.S.C. 1132(g)(1). See Emmenegger, 33 F. Supp. 2d at 1133; cf., Emery v. Hunt, 272 F.3d 1042, 1048 (8th Cir. 2001). However, the cost of computer assisted legal research, must be borne by the attorney's fee rate and may not be separately shifted to the defendants either as a recoverable cost of litigation, Leftwich v. Harris-Stowe State College, 702 F.2d 686, 695 (8th Cir.1983) (costs for computer-aided research are not covered under § 1920), or as an expense shifted under § 1132(g)(1). Emmenegger, 33 F. Supp. 2d at 1136-37; U & I Sanitation, 112 F. Supp. 2d 902, 905-06 (D. Neb. 2000); see also, Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 409-10 (7th Cir. 2000).

Expert witness fee

The court sustains Moore's objection to a $1,000 expert witness fee paid to Jack B. Helitzer on August 20,1998. See Exhibit 11, attached to Defs' Memorandum (Doc. No. 183), filed November 13, 2001. The fees of expert witnesses are not recoverable as costs, other than as are the fees of ordinary witnesses. Only the statutory witness fees, per diem, and transportation costs of witnesses are recoverable. 28 U.S.C. §§ 1920(3), 1821(b); see Crawford Fitting Co., 482 U.S. at 445; Pinkham, 84 F.3d at 295. Nor may the fees of expert witnesses be shifted under 29 U.S.C. § 1132(g)(1). Emmnegger, 33 F. Supp. 2d at 1136.

Payments to retained counsel

Geissal seeks to recover a total of $5,000 paid to attorney Greidinger on November 6, 2000, and February 27, 2001. See Exhibit 11, attached to Defs' Memorandum (Doc. No. 183), filed November 13, 2001. Moore argues that such payments are not recoverable under 28 U.S.C. § 1920. The court agrees. Such costs appear from the record to be items included in an attorney's overhead, which is not separately recoverable.

The remaining claimed[9] costs and expenses are taxable and reasonable, and shall be paid by Moore. The recoverable costs and expenses total $21,015.75.

All tolled, the court determines the lodestar amount to be $434,739.40.

The lodestar amount is presumptively the reasonable fee, and a court may adjust it upward or downward, only upon specific evidence on the record and detailed findings that the lodestar amount is unreasonably low or unreasonably high. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

Adjustment of lodestar

In the second step of the lodestar method of determining attorneys' fees, the court may adjust the lodestar upward or downward based on factors not subsumed in the initial calculation of the lodestar. Blum v. Stenson, 465 U.S. 886, 898-901(1984). Specifically, the court may look at the results obtained. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) ("A reduced fee;

award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole"); 10 see also Jenkins, 127 F.3d a 716 ("If the plaintiff's success is limited, he is entitled only to an amount of fees that is reasonable in relation to the results obtained").

In this case, plaintiff has prevailed only on the Count I claim that Moore violated COBRA by failing to provide James Geissal with continuation health insurance. The sole relief received by plaintiff is the declaration of rights by the Supreme Court. Plaintiff has been determined not to be entitled to any monetary recovery. Counts II and III were dismissed as moot. And the court has determined that Geissal is not entitled to penalties under Count IV.

The cardinal issue presented is whether the relief awarded under Count I merits a fee-shifting of the attorney effort on the unsuccessful portion of Count I and on Counts II, III, and IV. Because of its seminal relevance, the Supreme Court's early pronouncement in this area is restated:

The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the Plaintiff's claims for relief will involve a common core of facts or will be based on related legal

theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith my raise alternative legal grounds for a desired outcome, and the courts rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Hensley, 461 U.S. at 435-36 (internal citation and footnotes omitted).

This is not a case such as Emery, 272 F.3d 1042, in which plaintiffs obtained some ultimate relief on an successful state law claim but not an the alternative federal law claim for the same relief. 272 F.3d at 1047. In that case, the prevailing plaintiffs were entitled to shift their attorneys' fees for their work on the unsuccessful federal claim. Id.

Considering the degree of success obtained, Geissal's case may be likened to one where the plaintiff won a judgment of liability, but lost on the past judgment remedy efforts. E.g., Jenkins, 127 F.3d 709; Association for Retarded Citizens of N. Dak. v. Schafer, 83 F.3d 1008 (8th Cir. 1996), cert. denied, 519 U.S. 993 (1996). In such a case, the court should determine whether Geissal's efforts toward a monetary recovery are "inextricably intertwined with" or are distinct from the efforts which achieved the judgment of liability. Clearly, both efforts were based on the same federal statutes and arose out of a generally common set of facts that included James Geissal's employment with Moore, the notice and actions of Moore, James' entitlement to continuation coverage, and his medical expenses. Nevertheless, the court must still consider that out of all the litigation in this action, Geissal's victory was early on and entirely declaratory; all subsequent efforts to derive a personal, monetary benefit were unsuccessful. For the purpose of fee-shifting, this last factor "certainly [changes] the overall significance of the plaintiffs victory." Jenkins, 127 F.3d at 718.

This is like a case where the plaintiff achieved one victory and then expended entirely unsuccessful efforts not to defend the victory but to achieve a greater victory. In such a case the plaintiff "is entitled to a proportionately lesser fee award than a prevailing party who merely defends its victory" unsuccessfully. Schafer, 83 F.3d at 1012.

Considering that Geissal achieved her sole, limited victory, by judgment of liability before the Supreme Court, the appropriate shifted fee is fifty percent of the lodestar amount, or $217,369.70.

An appropriate order is issued herewith.

Signed this 29th day of March, 2002.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

APPPENDIX A

DATE	HOURS	DATE	HOURS	DATE	HOURS
02.01.95	.58	7.17.98	.25	12.28.98	.33
02.02.95	.25	07.21.98	2.00	01.16.99	.33
06.18.96	2.83	09.22.98	.25	03.25.99	.17
08.19.96	1.42	10.01.98	.25	04.06.99	.50
07.31.97	.25	10.12.98	.42	04.21.99	.08

02.13.98	.25	11.02.98	.42	05.03.99	1.00
04.22.98	1.00	11.03.98	.25	05.12.99	1.00
05.01.98	3.83	11.03.98	.67	05.20.99	.42
05.02.98	.25	11.06.98	.33	09.15.00	.25
05.15.98	1.50	11.10.98	.58	02.18.01	6.00
06.10.98	1.00	11.24.98	1.00		
06.19.98	.17	12.09.98	.17		
				TOTAL HOURS	31.33

APPENDIX B

DATE	HOURS	DATE	HOURS	DATE	HOURS
10.25.94	4.00	10.05.97	2.08	09.22.98	.25
07.11.95	.25	10.09.97	2.00	10.12.98	.42
09.16.96	.25	10.10.97	2.50	11.10.98	.58
11.01.96	.58	10.14.97	2.50	11.24.98	1.75
				TOTAL HOURS	17.16

APPENDIX C

DATE	HOURS	DATE	HOURS	DATE	HOURS
07.26.95	.25	09.15.97	3.50	02.23.98	.17
08.19.95	.33	09.23.97	1.50	02.27.98	7.00
08.31.95	.50	10.17.97	2.00	03.03.98	1.50
09.01.95	.25	11.03.97	.33	03.18.98	.25
09.12.95	1.00	11.10.97	2.00	03.23.98	2.00
09.15.95	2.00	11.14.97	.33	03.24.98	.33
09.16.95	.25	11.26.97	1.25	04.03.98	1.50
10.26.95	.25	12.11.97	.33	04.10.98	4.67
10.27.95	1.00	01.20.98	.42	04.11.98	5.67
03.20.96	.50	01.27.98	.83	04.14.98	4.00
06.13.97	1.50	02.03.98	2.33	04.15.98	5.67
06.14.97	1.25	02.07.98	.50	05.01.98	3.83
07.02.97	.75	02.09.98	.67	06.08.98	1.00
07.10.97	.50	02.11.98	.25	06.09.98	1.00

09.05.97	.42	02.16.98	.58	08.20.98	6.75
08.21.98	1.75	11.09.98	.42	11.09.98	.42
12.24.98	.33	04.21.99	.50	04.21.99	.33
				TOTAL HOURS	76.66

FOOTNOTES

[1] That subsection provides that are employer may cancel COBRA continuation coverage as of "[t] the date on which the qualified beneficiary first becomes, after the date of the election . . . covered under any other group health plan (as an employee or otherwise) . . . ." See 29 U.C.S. § 1162(2)(D)(i) .

[2] Geissal did not seek reimbursement from TWA/Aetna for expenses he incurred on a trip to Greece to obtain immunotherapy in a last effort to cure his cancer.

[3] This section provides that a participant or beneficiary may bring a civil suit "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms o the plan." See 29 U.S.C. § 1132(a)(3).

[4] This section provides that a participant or beneficiary may bring a civil suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future

benefits under the terms of the plan." See 29 U.S.C. § 1132(a)(l)(B).

[5] TWA/Aetna covered much of Geissal's expenses.

[6] The court notes that the written affidavit submitted by attorney Greidinger was inadvertently not signed.

[7] Reduced rate far ton-legal work. See supra.

[8] This section allows for the recovery of the following costs:

(1) Fee of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services.

[9] Geissal agrees with Moore that $342.46 relating to a bankruptcy proceeding in Kentucky are not compensable costs, they having been inadvertently included in her claim.

[10] The original 12 Hensley factors were: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by

the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hensley, 461 U.S. at 430 n.3.

These factors were subsequently refined by the Supreme Court in Blum v. Stenson. 465 U.S. 886, 898-901(1984) (novelty or complexity of the issues should not be considered at the second step, and quality of representation and results obtained are ordinarily subsumed in the lodestar determination and in most cases should not be considered in the second step), and City of Burlington v. Dague, 505 U.S. 557, 566-67.(1992) (contingency nature of a fee cannot be considered as a factor bearing on the amount of attorney's fees).

NO. 4:94 CV 1263 DDN

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BONNIE L. GEISSAL,
Plaintiff,

v.

MOORE MEDICAL CORP., GROUP BENEFIT PLAN OF MOORE MEDICAL CORP., AND HERBERT WALTER n1,
Defendants.

March 29, 2001, Decided
March 29, 2001, Filed

COUNSEL: For MOORE MEDICAL CORP., defendant: Daniel J. Schwartz, GREENSFELDER AND HEMKER, St. Louis, MO.

For GROUP BENEFIT PLAN OF MOORE MEDICAL CORP., HERBERT WALKER, defendants: Edward M. Goldenhersh, Vice-President, Daniel J. Scwartz, GREENSFELDER AND HEMKER, St. Louis, MO.

For BONNIE L. GEISSAL, plaintiff: S. Sheldon Weinhaus, Partner, WEINHAUS AND DOBSON, St. Louis, MO.

JUDGES: David D. Noce, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: David D. Noce

OPINION:

MEMORANDUM

This action is before the court upon defendants' motion for partial summary judgment on Count I of plaintiff's complaint, specifically on the issue of damages (Doc. No. 139), and plaintiff's cross-motion for summary judgment on appropriate equitable relief (Doc. No. 139). The parties have consented to the exercise of authority by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Plaintiff James Geissal commenced this action in June 1994, alleging four counts under the Employee Retirement Income Security Act ("ERISA"), amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Defendants are plaintiff's former employer, Moore Medical Corporation ("Moore"). Group Benefit Plan of Moore Medical Corporation, and Herbert Walter, the Plan Administrator.

Plaintiff alleged four counts for relief. Count I alleged that defendants violated COBRA by failing to provide him with continuation coverage after Moore terminated his employment. Count II alleged that Moore was estopped from denying him COBRA coverage because plaintiff relied on its initial representation that he was entitled to COBRA coverage. Count III alleges that defendants waived any differing construction or interpretation of plan provisions. Count IV alleges that Herbert Walter, the Plan Administrator, failed to

provide requested documents in violation of 29 U.S.C. § 1024(b)(4).

Plaintiff has moved for partial summary judgment. In March 1996, this court denied plaintiff's motion for partial summary judgment and sua sponte granted partial summary judgment for defendants. n2 Geissal v. Moore Medical Corp., 927 F. Supp. 352, 361 (S.D. Mo. 1996). The Eighth Circuit affirmed on interlocutory appeal. Geissal v. Medical Corp., 114 F.3d 1458 (8th Cir. 1997). However, the United States Supreme Court vacated the opinion of the Eighth Circuit and remanded the case. Geissal v. Moore Medical Corp., 524 U.S. 74, 141 L. Ed. 2d 64, 118 S. Ct. 1869 (1998).

Plaintiff then moved for reconsideration of the court's ruling on plaintiff's earlier motion for partial summary judgment. In March 1999, the court granted plaintiff's motion and determined that defendant Moore Medical Corporation was obligated to provide COBRA coverage to James Geissal, but that plaintiff's entitlement to other relief would have to await the conclusion of any trial or other factfinding conducted by the court. See Order and Memorandum, filed March 23, 1999 (Doc. No. 83) . In September 1999, the court ordered the parties to file cross-motions for partial summary judgment on certain liability issues. See Order, filed Sept. 23, 1999 (Doc. No. 119).

The Court must grant summary judgment if the pleadings, admissions, stipulations, depositions and affidavits demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct.

2548 (1986); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 863, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982) (plurality opinion). The moving party must initially demonstrate the absence of an issue for trial. Celotex, 477 U.S. at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. Pico, 457 U.S. at 863.

Once a motion is properly made and supported, the non-moving party may not rest upon the allegations in the pleadings but must instead demonstrate the existence of admissible evidence of specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); Buford V. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). Although the court views the facts in the light most favorable to the non-moving party, "in order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be genuine dispute over those facts that could actually affect the outcome of the lawsuit." Webb v. Lawrence County, 144 F.3d 1131, 1135 (8th Cir. 1998).

For the convenience of the parties, the court will restate the undisputed facts which the court set forth in its March 23, 1999 ruling:

"1. On July 16, 1993, Moore Medical Corporation terminated James Geissal from employment. At the time of his termination, Geissal was 62 years old and had cancer. During his employment at Moore, Geissal was a participant in a health benefits plan, the Group Benefit Plan of Moore Medical Corp., sponsored by Moore for its employees.

"2. Moore Medical Corp. is an employer and the plan sponsor within the meaning of 29 U.S.C. § 1102(5) and (16)(B), of defendant Group Benefit Plan of Moore Medical Corp. (the Plan). The Plan is an employee welfare benefit plan as defined in 29 U.S.C. § 1002(1). Defendant Group Benefit Plan of Moore Medical Corp. provides for the payment and reimbursement to plan participants of various medical expenses and is a group health plan as defined in 29 U.S.C. § 1167(1)

"3. While Geissal was employed at Moore, his wife, Bonnie, was employed by Trans World Airlines (TWA). By reason of Bonnie Geissal's employment at TWA, James Geissal was a covered dependent eligible for coverage under the health insurance policy issued by Aetna Life Insurance Company. Aetna was the health provider or third-party administrator under the TWA plan provided by TWA for its employees. Geissal's coverage through his wife's plan preceded Geissal's termination by Moore.

"4. Upon Geissal's termination at Moore Medical, Geissal received a notice of his right under COBRA to continue health insurance coverage under Moore's benefit plan. He accepted Moore's offer and elected to continue receiving group health coverage under Moore's Plan. He began making premium payments, which the defendants accepted. Approximately six months after his termination, by letter dated January 27, 1994, defendants informed Geissal that they had determined he was not entitled to COBRA coverage because he was already covered under a group policy with Aetna. Geissal was told that the premiums he had already paid would be returned and that those who

provided him with medical care during that period would not be paid by the Plan.

"5. Moore's plan had an annual deductible of $ 150. It also provided for a lifetime maximum amount of benefits. TWA's plan through Aetna had an annual deductible of $ 500 per year per person and also provided a lifetime maximum amount of benefits.

"6. At the time Geissal was terminated, he requested and received a service letter pursuant to Missouri Revised Statute § 290.140. At the time he was terminated, he considered whether he should consult an attorney to investigate what rights and claims he might have against Moore because he felt he had been unfairly terminated. Geissal decided not to do so, because his main concern was that he have full and adequate health insurance. Moore representatives encouraged him to make the COBRA election, which did much to assuage his feelings about his discharge. At about this time, and shortly after the issuance of the service letter, the Plan or its reinsurer were making large payments for medical care provided to Geissal prior to his termination. Because he was offered the COBRA continuation coverage, Geissal did not look for another insurance carrier."

Order and Memorandum, at 2-3.

Arguments in Support of Both Parties' Motions

In support of their motion for partial summary judgment, defendants argue that plaintiff's damages are limited to Geissal's unreimbursed out-of-pocket medical expenses that would have been covered under

the Moore Plan had he been provided with COBRA continuation coverage, less deductibles and premium payments due Moore for such coverage. Defendants argue that the reason for this is that TWA/Aetna covered much of plaintiff's expenses. Any claim that TWA/Aetna may have had on Geissal's estate is barred by the applicable statute of limitations.

Therefore, to allow plaintiff to recover for benefits paid by TWA/Aetna that TWA/Aetna is not able to then recover from plaintiff would present a windfall to the plaintiff, which is prohibited.

Defendants claim that Mr. Geissal's unreimbursed out-of-pocket medical expenses, which would have been covered under the Moore Plan, were $ 2,614.08. Defendants then claim that the amount of deductibles, copayments and premium payments that Geissal would have been required to pay for COBRA continuation coverage under the Moore Plan would have been $ 2,973.18. Therefore, defendants argue, because the sum of the continuation coverage premiums and deductibles exceeds plaintiff's unreimbursed out-of-pocket medical expenses by $ 359.10, plaintiff suffered no damages and that summary judgment should be granted in favor of defendants on the issue of damages.

In her combined memorandum, plaintiff argues that defendants have been unjustly enriched by the failure of the Moore Plan to provide benefits to Mr. Geissal. Therefore, plaintiff argues, she is entitled to "other appropriate equitable relief," as provided by 29 U.S.C. § 1132(a)(3), in the form of restitution.

Plaintiff disputes defendant's argument that TWA/Aetna would be unable to recover any money from Geissal's estate. She argues that because ERISA preempts Missouri law, nothing in Missouri law could stop TWA/Aetna from bringing an ERISA action against the estate for the enforcement of an equitable lien or the creation of a constructive trust, or from intervening in the present action. Plaintiff also points out that Aetna/TWA uses only the services of doctors, labs and hospitals who agree to provide discounts to TWA/Aetna. On the other hand, plaintiff argues, had the Moore Plan covered the benefits, the providers would have been able to charge their full price for the medical services rendered.

Plaintiff claims there is no valid reason to exclude the medical expenses of Mr. Geissal in Greece because the Moore Plan provided for the funding of alternative medical treatment, considered on a case by case basis. n3 Plaintiff finally argues that Mr. Geissal was entitled to an extension of COBRA benefits beyond January 17, 1995, and that she is entitled to reimbursement of amounts not paid by either plan.

In defendants' memorandum in response to plaintiff's cross-motion for summary judgment and in reply to plaintiff's response to defendants' motion for partial summary judgment, defendants argue that plaintiff is not entitled to relief under § 1132(a)(3) because she has a claim for benefits available under § 1132(a)(1)(B). Defendants further argue that in order to obtain relief under § 1132(a)(3), plaintiff must first establish a breach of fiduciary duty and that she has failed to do so. Finally, defendants argue that plaintiff's requested

relief is not equitable relief and that she is not entitled to the amount claimed.

Finally, plaintiff argues in her reply that defendants may not raise the fiduciary responsibility issue for the first time in their reply. Nevertheless, plaintiff argues that restitution and other equitable relief are available as remedies under ERISA and COBRA absent proof of breach of fiduciary duty. Plaintiff also argues that her claims are for equitable restitution and do not amount to claims for legal damages.

Discussion

The civil enforcement provision of ERISA, 29 U.S.C. § 1132, provides, in relevant part:

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a).

In Count I of her complaint, plaintiff pleaded the following:

WHEREFORE, plaintiff prays for compensatory damages and for prejudgment interest on past due benefits, for such further injunctive and equitable relief as may be appropriate in the circumstances, for penalties allowable under 29 U.S.C. § 1132(c), for his costs and expenses including a reasonable attorney's fee, for punitive damages if found to be appropriate, and for such other and further relief as may be meet and just in the premises.

Complaint, filed June 30, 1994 (Doc. No. 1), at 6. Both parties recognize that compensatory damages are not available under § 1132(a)(3). See Kuhl v. Lincoln National Health Plan of Kansas City, 999 F.2d 298, 304-05 (8th Cir. 1993), cert. denied, 510 U.S. 1045, 126 L. Ed. 2d 661, 114 S. Ct. 694 (1994). However, plaintiff argues that she is entitled to "other appropriate equitable relief" available under § 1132(a)(3). Specifically, as noted above, she seeks restitution.

The United States Supreme Court has noted the following: The statute authorizes "appropriate" equitable relief. We should expect that courts, in

fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Varity Corporation v. Howe, 516 U.S. 489, 515, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)) (other citations omitted). The Eighth Circuit, interpreting Howe held that "where a plaintiff is 'provided adequate relief by [the] right to bring a claim for benefits under . . . § 1132(a) (1) (B),' the plaintiff does not have a cause of action to seek the same remedy under § 1132(a) (3) (B)." Conley v. Pitney Bowes, 176 F.3d 1044, 1047 (8th Cir. 1999) (quoting Wald v. Southwestern Bell Corp. Customcare Medical Plan, 83 F.3d 1002, 1006 (8th Cir. 1996)), cert. denied 528 U.S. 1136 (2000). See also Hall v. LHACO. Inc., 140 F.3d 1190, 1197 (8th Cir. 1998).

The Supreme Court in the case at bar noted and held the following:

The issue in this case is whether 29 U.S.C. § 1162(2) (D) (e) allows an employer to deny COBRA continuation coverage to a qualified beneficiary who is covered under another group health plan at the time he makes his COBRA election. We hold that it does not.

Geissal, 524 U.S. at 76. Therefore, the court held that defendants were obligated to provide plaintiff with coverage under COBRA.

However, other courts have held that when a beneficiary has died, benefits under the plan are no longer recoverable under § 1132(a)(1). See Turner v. Fallon Community Health Plan, 127 F.3d 196, 198 (1st Cir. 1997), cert. denied 523 U.S. 1072, 140 L. Ed. 2d 666, 118 S. Ct. 1512 (1998). Turner specifically held that "the relief expressly provided [under § 1132(a) (1) (B)] is to secure benefits under the plan rather than damages for a breach of the plan." Id. Another court has noted the following:

Mr. Foster is not the participant or beneficiary, so he may not personally bring an ERISA suit. As the representative for his wife's estate, he may bring a suit on her behalf. However, the only recovery allowed by [§ 1132(a) (1) (B)] is a recovery of plan benefits. Due to Mrg. Foster's death, an award of benefits is not available.

Foster v. Blue Cross and Blue Shield of Michigan, 969 F. Supp. 1020, 1029 (E. D. Mich. 1997). Therefore, § 1132(a) (1) does not provide plaintiff with an adequate remedy, and the court must consider the propriety of other appropriate equitable relief under § 1132(a) (3).

The Eighth Circuit has succinctly delineated the difference between equitable restitution and compensatory restitution as follows:

Though we sometimes speak of restitution in generic terms, restitution may be either equitable or

compensatory. The basic distinction between equitable restitution and compensation focuses on the genesis of the award sought by plaintiff. A restitutionary award focuses on the defendant's wrongfully obtained gain while a compensatory award focuses on the plaintiff's loss at the defendant's hands. Restitution seeks to punish the wrongdoer by taking his ill-gotten gains, thus, removing his incentive to perform the wrongful act again. Compensatory damages on the other hand focus on the plaintiff's losses and seek to recover in money the value of the harm done to him.

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999) (citations and footnote omitted). As noted above, plaintiff argues that defendants were unjustly enriched by its failure to pay for plaintiff's medical expenses and that the providers were unable to charge their full rates because TWA/Aetna required them to accept lower rates.

The Ninth Circuit has considered a case similar to the one at bar. In Bast v. Prudential Ins. Co. of America, 150 F.3d 1003 (9th Cir. 1998), cert. denied 528 U.S. 870, 145 L. Ed. 2d 144, 120 S. Ct. 170 (1999), Rhonda Bast was diagnosed with breast cancer. Her oncologist recommended that she undergo an autologous bone marrow transplant procedure. Id. at 1005. Her insurance company, Prudential, initially denied coverage for the procedure in December 1991, but later reconsidered and said that it would provide coverage in February 1992. Id. at 1006. However, by this time, Bast's cancer had spread and it was too late for her to undergo the procedure. Id. Her health declined and she died in January 1993. Id.

Her husband and minor son filed a federal complaint alleging state law claims and ERISA claims. Id. The district court held that plaintiffs' state law claims were preempted by ERISA and there was no remedy available under ERISA for the ERISA claims. Id. The plaintiffs argued that they should be allowed to recover the equitable remedy of restitution under § 1132(a)(3) as other appropriate equitable relief. Id. at 1010. The court of appeals held as follows:

The district court concluded that to grant restitution to the Basts would be equivalent to awarding them money damages, and such an award would not be an equitable remedy. The court stated:

In this case, where the only conceivable remedy that I could foresee would be the cost of the procedure which the plaintiff was not given at a time when it would have hopefully provided some relief for her, is the same as really a legal recovery of cost . . . I see no other possible theory of restitution that would be "appropriate" in the sense of it being different than a legal remedy.

We agree.

Id.

The court concludes that the reasoning of the Ninth Circuit in Bast is relevant and persuasive. An award of restitution in this case would be the equivalent of awarding compensatory damages. This would be contrary to Supreme Court precedent which dictates that "section 1132(a) (3) recovery is limited to classic equitable remedies such as injunctive, restitutionary, or mandamus relief, and does not extend to compensatory

damages." Kerr, 184 F.3d at 943 (citing Mertens v. Hewitt Assocs., 508 U.S. 248. 256-58, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)). See also, Rogers v. Hartford Life and Accident Ins. Co., 167 F.3d 933, 944 (5th Cir. 1999) ("other appropriate equitable relief" available in § 1132(a) (3) did not include "make-whole relief" in the form of medical expenses); Allinder v. Inter-City Prods. Corp., 152 F.3d 544, 552 (6th Cir. 1998) (compensatory damages resulting from a breach of trust not recoverable under § 1132(a) (3) following Mertens), cert. denied 525 U.S. 1178, 143 L. Ed. 2d 110, 119 S. Ct. 1115 (1999).

Equitable relief, such as in the form of an injunction requiring the Moore Plan to reinstate James Geissal as a beneficiary, would have been entirely appropriate while Mr. Geissal was alive and within the 18 month time frame of COBRA. See, e.g., Howe v. Varity Corp. 36 F.3d 746, 756-57 (8th Cir. 1994) (plaintiffs wrongfully induced to' leave one company for another and lost benefits when the other company failed were entitled to an injunction restoring them to the previous plan and payments of money they would have received had they never left the previous plan), aff'd, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). Indeed, plaintiff acknowledged that this was a major concern at the time of the filing of this lawsuit and one of the main reasons Mr. Geissal moved early for partial summary judgment. Pl. Combined Memo., filed August 4, 2000 (Doc. No. 139) at 1, n.1.

The court recognizes that this essentially leaves plaintiff without relief against the Moore Plan. Several courts have noted this problem and the gap in ERISA remedies as a result of the preemption of state

remedies. See Bast, 150 F.3d at 1010 ("Although forcing the Basts to assert their claims only under ERISA may leave them without a viable remedy, this is an unfortunate consequence of the compromise Congress made in drafting ERISA"); Turner, 127 F.3d at 200-01 ("Appellant, recognizing that the statutory and case law compels the district court's grant of summary judgment to appellee, addresses entreaties to us which, if appropriate at all, are appropriate to the legislative branch. Periodic accusations to the contrary notwithstanding, the courts are not legislative bodies.") (Hill, J., concurring); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 65 (D. Mass 1997) ("Although the alleged conduct of Travelers and Greenspring in this case is extraordinarily troubling, even more disturbing to this Court is the failure of Congress to amend a statute that, due to the changing realities of the modern health care system, has gone conspicuously awry from its original intent"); cf. Prudential Ins. Co. of Am. v. National Park Med. Center, Inc., 154 F.3d 812, 830 (8th Cir. 1998) (On the issue of preemption, "it is for Congress, not the courts, to reassess ERISA in light of modern insurance practices and the national debate over health care").

Therefore, plaintiff's cross-motion for summary judgment for appropriate equitable relief (Doc. No. 139) will be denied. Defendants' motion for partial summary judgment on Count I of plaintiff's complaint, specifically on the issue of damages (Doc. No. 139) will be granted. Both parties agree that Counts II and III are moot. See Def. Memo. in Support, filed August 4, 2000 (Doc. No. 139), at 5 n.4; Pl. Motion to Reconsider, filed August 31, 1998 (Doc. No. 57), at 7.

Therefore, the only issues remaining before this court are those alleged in Count IV, chiefly plaintiff's entitlement to penalties as a result of defendant Walter's failure to provide plaintiff with requested documents in violation of 29 U.S.C. § 1024(b) (4), and attorney's fees. Plaintiff adverted to these issues in her memorandum, in footnotes 2 and 3, filed August 4, 2000. The court will consider those issues according to a schedule ordered by the court.

An appropriate order is issued herewith.

David D. Noce
UNITED STATES MAGISTRATE JUDGE
Signed this 29th day of March, 2001.

ORDER

In accordance with the Memorandum filed herewith,
IT IS HEREBY ORDERED that defendants' motion for partial summary judgment on Count I on the issue of damages (Doc. No. 139) is granted.

IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment for appropriate equitable relief (Doc. No. 139) is denied.

IT IS FURTHER ORDERED that plaintiff may file a motion for the award of a penalty and fees within thirty days of this date.

David D. Noce
UNITED STATES MAGISTRATE JUDGE
Signed this 29th day of March, 2001.

FOOTNOTES

n1 This defendant's surname has been spelled "Walker" in the pleadings. However, the correct spelling is "Walter." See Affidavit of Herbert Walter, filed May 7, 1999. The style of the case is therefore corrected.

n2 While summary judgment was pending, James Geissal died, and Bonnie Geissal, his wife and the personal representative of his estate, replaced him as plaintiff.

n3 Near the end of Mr. Geissal's life, the Geissal's traveled to Greece to obtain immunotherapy in a last effort to save his life.

No. 02-2255No. 02-2256

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Bonnie L. Geissal, as personal representative of the Estate of James W. Geissal,
Appellant/Cross-Appellee,

vs.

Moore Medical Corporation, et al.,
Appellees/Cross-Appellants.

September 12, 2003, Decided

OPINION:

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 12, 2003

No. 2-2255

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Bonnie L. Geissal,
Appellant,

vs.

Moore Medical Corporation, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri
4:94 CV 1263 DDN

Appellant's application for fees on appeal is granted in part. Appellant is awarded the mount of $5,000.00 in attorney fees.

Appellant shall recover from appellees the sum of $1,015.94 as taxable costs on appeal.

Appellees' motion for attorneys fees on appeal is denied.

The clerk of the United States District Court is directed to place these fees and costs in the previously issued mandate.
(5232-010199)

September 19, 2003

Order Entered at the Direction of the Court
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JAN 16 2004
OFFICE OF THE CLERK

(2)

No. 03-874

In The Supreme Court of the United States

BONNIE L. GEISSAL,
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF JAMES W. GEISSAL,

Petitioner,

v.

MOORE MEDICAL CORP.; GROUP BENEFIT PLAN
OF MOORE MEDICAL CORP.; HERBERT WALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Moore Medical Corp. has no parent corporation. As of April 11, 2002, Heartland Advisors, Inc., an institutional investor, owned 13% of the outstanding stock of Moore Medical Corp. No other publicly held company owns more than 10% of Moore Medical Corp.

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I. INTRODUCTION

Respondents ask that this Court reject the Petition for Writ of Certiorari. As will be briefly shown below, Petitioner has misrepresented the facts and misstated the law. When the facts and law are accurately presented, this case satisfies none of the considerations governing review on certiorari set forth in Supreme Court Rule 10. Under Supreme Court Rule 14.4, the Petitioner's failure to present, with accuracy and clarity, whatever is essential to a ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny its Petition.

Moreover, the Petitioner does not contest the Eighth Circuit's holding that the Petitioner is, except possibly on two remanded claims not ripe for appeal, entitled to no recovery because the Moore Plan[1] provides that "benefits are not payable for . . . services for which there is no obligation to pay." *Geissal v. Moore Medical Corp., et al.*, 338 F.3d 926, 932 (8th Cir. 2003). Instead, the Petitioner submits a baseless claim for recovery on behalf of non-parties who, as direct claimants, would not be entitled to an ERISA recovery. Petition, pp. 8, 10, 11, 12-16.

II. STATEMENT OF THE CASE

Inasmuch as the Petitioner's presentation of the facts is misleading, Respondents ask that this Court substitute

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[1] In this brief, the Group Benefit Plan of Moore Medical Corp. will be called the "Moore Plan." Moore Medical Corp. will be called "Moore." The TWA Group Medical Plan will be called the "TWA Plan."

the Eighth Circuit's concise and accurate Background statement. *Geissal,* 338 F.3d at 929-930.

III. REASONS FOR DENYING THE PETITION

A. Petitioner's Failure to Act on the Eighth Circuit's Remand

The Eighth Circuit affirmed the district court's results in all respects except that it remanded two questions for further consideration: whether the estate should, under the Moore Plan, recover (1) the $4,425 in health care expenses which remained unreimbursed under the TWA Plan and (2) approximately $9,000 in expenses for cancer treatments in Greece not presented for payment to the TWA Plan. The Eighth Circuit directed remand on July 31, 2003. *Id.* at 936. Although the Petition states that the "question posed by this Court in its footnote 3 in *Geissal I* . . . was never answered by the district court," it fails to add that the question has not been answered because Petitioner has failed to act on the remand. Petition, p. 9.

B. Petitioner's Misrepresentations of Fact

Petitioner's statements that the Moore Plan was primary are unsupported by the record. Petitioner's arguments are based on unsupported assertions that the Moore Plan was primary. *See, e.g.* Petition, pp. 11, 14, 15, 17. Nothing in the record establishes which of the Plans was the primary insurer and which secondary. The Petitioner's claim that TWA Plan is secondary is misleading. *Id.*, p. 14. The Eighth Circuit did not find which of the two Plans was primary and which secondary. It did find that, as a matter of fact, the TWA Plan had acted as the primary insurer and that it had paid all submitted medical expenses of Mr.

Geissal, other than expenses totaling $4,425 not covered under the TWA Plan. *Geissal,* 338 F.3d at 929-930.

Respondents did not "secretly" hold up payment of $104,458.34. Petitioner claims that Respondent Moore "secretly" held up payment of $104,4587.34 [*sic*; presumably, $104, 458.34] of Mr. Geissal's medical bills during the first six months of the COBRA period. Petition, pp. 6, 10, 20. This claim is false. In the district court, Respondents introduced uncontradicted evidence that the unpaid bills as of January 20, 1994 (one week before Moore rescinded Geissal's COBRA coverage) totaled $8,200. J.A.[2], p. 0792. The Eighth Circuit found that, as a matter of fact, all of Mr. Geissal's medical expenses had been paid, with the possible exception of the two items remanded to the district court. *Geissal,* 338 F.3d at 929-930.

There was no "fraudulent taking," "defalcation," or other intentional violation by Respondents. Petitioner's allegations that Respondents engaged in "fraudulent taking," "defalcation" and other intentional violations (Petition, pp. 11, 19 and 21) are not substantiated by the record. Nothing in the record supports Petitioner's suggestions that Moore never intended to give Mr. Geissal COBRA coverage and that it gave him a COBRA notice to dissuade him from filing age and disability claims with the Equal Employment Opportunity Commission. *Id.*, pp. 11, 20.

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[2] J.A. refers to the Joint Appendix filed in the Court of Appeals.

C. Petitioner's Misstatements of Law

There is no ERISA-recognized "doctrine of negative restitution." The Petitioner states that the Eighth Circuit misapplied the "doctrine of negative restitution." *Id.*, p. 12. Respondents searched the combined Federal courts database in Lexis and were unable to find a case referring to such a doctrine. Petitioner claims that the Seventh Circuit found it be a "valid ERISA and remedies concept" in *Reich v. Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994). Petition, pp. 12-13. The *Reich* court discusses "negative unjust enrichment" as a corollary of the concept of unjust enrichment. In *Reich*, the party seeking restitution was the plaintiff, while in the present case the Petitioner seeks "negative restitution" not for the plaintiff (itself) but for the providers and the TWA Plan, who are not parties to this suit.[3] Significantly, Petitioner objected to Respondents' effort in the district court to join the TWA Plan as a party (J.A., pp. 0072-0074), and the TWA Plan has made no claim against the estate. *Geissal*, 338 F.3d at 933, note 3. Although its counsel wrote to providers advising that the Moore Plan was (in his view) responsible for their undiscounted bills, the parties have stipulated that no provider has asserted a claim. J.A. pp. 0569, 0315, Stipulations 27-29. As the Eighth Circuit correctly pointed out, the providers

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[3] Petitioner argues that it should be entitled to a "negative restitution" recovery under ERISA to be held in constructive trust on behalf of parties who, under *Mertens v. Hewitt & Associates*, 508 U.S. 248 (1993), would not be entitled to recover as ERISA claimants on their own behalf and that the Petitioner should be entitled to recover on their behalf precisely *because* they are not entitled to recover as ERISA claimants on their own behalf. Petition, pp. 11, 14-15. This argument is a curious "negative a fortiori."

and the TWA Plan could have, but did not, assert claims against the estate. *Geissal*, 338 F.3d at 933, note 3. Moreover, counsel for the estate does not represent the medical providers or the TWA Plan, and they have no standing to appeal.

The Eighth Circuit correctly applied Knudson. Petitioner claims that the Eighth Circuit rejected the principle of equitable restitution that this Court articulated in *Great-West Life & Annuity Insurance Company, et al. v. Knudson*, 534 U.S. 204 (2002). Petition, p. 10. The Petitioner has misstated the decision of the Eighth Circuit, which correctly applied *Knudson* in finding that the Respondents held no *res* of the Petitioner, a fact never questioned by Petitioner. As the Eighth Circuit stated, "Here, any unjust enrichment of the Moore Plan resulted from benefits indirectly conferred by third parties, not by Geissal or his estate." *Geissal*, 338 F.3d at 932. Contrary to the Petitioner's argument (Petition, p. 11), nothing in the Eighth Circuit's opinion constituted "social legislation by its judicial amendment of ERISA to allow the a [*sic*] dual coverage secondary plan that suffered loss due to Respondents' defalcation, to sue the Respondents . . . " The court did not find the TWA Plan to be the secondary plan and it did not "allow" (or disallow) any such right to sue under ERISA. Contrary to the Petition, nothing in the Eighth Circuit's opinion "legislatively [*sic*] creates new causes of action for new parties in addition to those allowed in 29 U.S.C. §1132(a)." Petition, p. 12.

IV. CONCLUSION

Certiorari is not warranted. For the reasons set forth above, the Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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